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No. 08-____

IN THE
SUPREME COURT OF THE UNITED STATES

KHRISTIAN OLIVER,
Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Does juror consultation of the Bible during sentencing deliberations deprive a defendant of his federal constitutional rights?

2. When evaluating possible prejudice to a defendant resulting from juror consultation of the Bible during sentencing deliberations, what standard of proof should apply, or should there be an irrebuttable presumption of prejudice?

3. Did the Fifth Circuit misapply or contravene federal law by requiring Petitioner to present "clear and convincing" evidence to rebut what the Fifth Circuit believed was the state court's finding "that the Bible did not prejudice the jury's decision," given the state trial court refused to permit or consider juror testimony about the effect of the Bible consultation on the jurors or their deliberations?

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit addressing issues presented in this Petition was filed on August 14, 2008, is reported at 541 F.3d 329, and is reproduced in the separately bound Appendix to this Petition as Appendix A at 1a.[1] The Fifth Circuit's October 3, 2008 order denying rehearing is reproduced as Appendix C at 53a. Its October 13, 2008 judgment is reproduced as Appendix D at 55a.

The Fifth Circuit's November 16, 2007 Opinion addressing Petitioner's request for a stay to present new evidence in state court is published at 2007 WL 4014629, and is reproduced as Appendix B at 31a.

The November 9, 2005 Opinion of the United States District Court for the Eastern District of Texas, Beaumont Division, addressing issues presented in this Petition, is published *sub nom. Oliver v. Dretke* at 2005 WL 3050436, and is reproduced as Appendix E at 57a. Its February 2, 2006 Order, granting Petitioner's request for a Certificate of Appealability regarding issues presented in this Petition, is reproduced as Appendix F at 67a. Its September 29, 2005 Opinion addressing issues not raised in this Petition is published *sub nom. Oliver v. Dretke* at 2005 WL 2403751.

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[1] References to the Appendix to this Petition are in the form "1a."

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Fifth Circuit issued its final opinion on August 14, 2008. The Fifth Circuit denied Petitioner's timely petition for rehearing on October 3, 2008. 53a.

CONSTITUTIONAL & STATUTORY PROVISIONS

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

UNITED STATES CONSTITUTION, Amendment VI.

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

UNITED STATES CONSTITUTION, Amendment VIII.

"No state shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

UNITED STATES CONSTITUTION, Amendment XIV.

"(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

28 U.S.C. § 2254(d) & (e)(1).

INTRODUCTION

Petitioner was convicted of murder by a Texas jury, and sentenced to death. After his trial, Petitioner's counsel learned that members of the jury had consulted the Bible during their sentencing deliberations.

Petitioner moved the state court for a new trial, and for a hearing on the issue of the jury's consultation of the Bible.

The state trial court judge conducted a hearing on the Bible consultation issue, but specifically precluded testimony about the *effect* of any of the Bible consultation on members of the jury. In the presence of the four jurors who appeared to testify, the trial judge instructed: "[W]e can't go into the effect it had upon the jurors. And we have to be very careful about avoiding the effect it had upon any juror, if any. It's a matter of simply determining . . . what occurred in the jury room."

During the hearing, juror testimony revealed that: more than one juror brought a Bible into the jury room; at least one juror read Bible passages aloud to a group of jurors; jurors passed around a Bible with highlighted passages; one juror reviewed a specific Bible passage after observing another juror reviewing it; and one of the Bible passages the jurors consulted described as a "murderer" who "must be put to death" someone who commits acts much like those Petitioner was alleged to have performed.

Following the juror testimony, the trial judge denied the motion for a new trial. Petitioner's direct appeal to the Texas Court of Criminal Appeals and

subsequent effort to obtain state habeas relief were unsuccessful.

Petitioner then sought federal habeas review. The district court denied a writ of habeas corpus, but granted Petitioner a certificate of appealability regarding the juror Bible consultation issue.

On appeal, the Fifth Circuit determined that juror consultation of the Bible in this case was a constitutional error, which had deprived Petitioner of his Sixth Amendment rights. The court of appeals nevertheless denied the request for a writ of habeas corpus because the court (incorrectly) concluded it was required to defer to a "finding" by the state trial judge that "the Bible did not prejudice the jury's decision," when the state trial judge had foreclosed any evidence about the effect of the Bible consultation, and therefore could not have rendered such a finding.

Although the Fifth Circuit correctly determined that juror consultation of the Bible in this case was a constitutional error, its harmless error analysis was predicated on a misapplication of federal law.

Because the Fifth Circuit erred, and because its decision in this case addresses important issues related to the recurring problem of juror consultation of the Bible during deliberations (frequently in capital cases), about which lower courts disagree, this Petition should be granted.

STATEMENT OF THE CASE

A. Trial

On April 20, 1999, a Nacogdoches County, Texas jury convicted Petitioner of "capital murder based on his killing of [Joe] Collins during the commission of a burglary." 34a.

It was alleged at trial that on March 17, 1998, Petitioner, his then-girlfriend Sonya Reed, and cohorts Bennie and Lonny Rubalcaba, were driving around Nacogdoches County, Texas, when they stopped at the empty home of Mr. Collins to burglarize his house. 33a.

Petitioner and Lonny Rubalcaba broke into the house using bolt cutters, while Reed and Bennie Rubalcaba remained in their vehicle. 33a.

Collins came home during the break-in. Petitioner and Rubalcaba tried to escape out a back door, but the door was bolted from the outside and the windows were barred. Collins then fired a shot from his gun, hitting Rubalcaba in the leg. 33a.

Petitioner and Rubalcaba were also armed with a pistol, and with a rifle they had found in Collins's home. After Collins shot Rubalcaba, Petitioner shot back. Petitioner fired some shots inside the house and some outside in the front yard, where Collins ended up on his back. 33a, 263a-265a.

According to the trial testimony of Bennie Rubalcaba, Petitioner then struck Collins several times in the head with the butt of the rifle. 33a. A forensic expert at trial testified that the gunshots probably were fatal, but that the blows from the rifle could have been fatal on their own. 2a.

The group departed the scene, bringing the wounded Lonny Rubalcaba to a hospital, where they reported he had been the victim of a drive-by shooting. The next day, however, police officers interrogated the Rubalcabas, who provided information – and later testimony – that led to Petitioner's arrest and subsequent conviction. 34a; 262a-265a.

B. Sentencing Proceeding

The trial court commenced Petitioner's sentencing proceeding immediately after the jury delivered its verdict on guilt. Petitioner and prosecutors presented several days of testimony regarding aggravating and mitigating factors that affect whether death is an appropriate punishment.

After the presentation of the evidence and closing arguments – which included the prosecutor arguing Petitioner should be put to death because of the nature of the beating allegedly inflicted on Collins with the butt of the rifle – the trial court delivered a sentencing charge to the jury.

Unlike during the guilt phase of the trial, the court did not instruct the jury to limit its deliberations to the evidence heard on the witness stand and to the law as presented by the court. *See* Charge on Punishment, reproduced as Appendix L at 345a-350a.

The jury retired to conduct deliberations. As required by the Texas death penalty statute in effect at the time, the jury considered and answered two special questions: (1) whether "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to

society," and (2) whether, "taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, [] there is a sufficient mitigating circumstance or circumstances that a sentence of life imprisonment rather than a death sentence be imposed." 347a-348a; *see also* TEX. CODE CRIM. PROC. art. 37.071(2)(b)(1) & art. 37.071(2)(e)(1). The jury was directed not to answer the first question affirmatively or the second question negatively, "unless [it] agrees unanimously." 347a-348a; *see also* TEX. CODE CRIM. PROC. art. 37.071(2)(d)(2) & art. 37.071(2)(f)(2).

After deliberating, the jury returned a verdict form answering the first question affirmatively and the second question negatively. 347a-348a. Upon receiving this verdict, the trial court entered a judgment of death, as required by statute. TEX. CODE CRIM. PROC. art. 37.071(2)(g).

C. Motion for New Trial and Hearing on Juror Consultation of the Bible During Sentencing Deliberations

During post-sentencing juror interviews, Petitioner's trial attorneys discovered that some members of the jury brought copies of the Bible into the jury deliberation room, and that several jurors had read Bible passages aloud, and consulted Bible passages with other jurors.

Among the Bible passages some jurors consulted during sentencing deliberations was Numbers 35:16-19:

> And if he smite him with an instrument of iron, so that he die, he is a murderer: the murderer shall surely be put to death.
>
> And if he smite him with throwing a stone, wherewith he may die, and he die, he is a murderer: the murderer shall surely be put to death.
>
> Or if he smite him with an hand weapon of wood, wherewith he may die, and he die, he is a murderer: the murderer shall surely be put to death.
>
> The revenger of blood himself shall slay the murderer: when he meeteth him, he shall slay him.

3a-4a n.3.

Petitioner filed a motion for new trial with the trial court and requested a hearing. 3a. Petitioner argued the jury's consultation of the Bible during sentencing deliberations violated his rights, including his federal constitutional rights.

1. State Trial Court Limitation on Testimony About Juror Consultation of the Bible

On June 25, 1999, the state trial court held a hearing on Petitioner's motion for a new trial based on juror consultation of the Bible during sentencing deliberations. 70a. Although no juror had been willing to provide sworn written testimony regarding juror consultation of the Bible, four jurors appeared to testify at the hearing in response to subpoenas commanding their appearance.

Prior to hearing any testimony, however, the court heard argument on the propriety of allowing

any testimony about jury deliberations. The State argued that no testimony was warranted, because Petitioner failed to provide any juror affidavits attesting that the jury had considered any "outside influence," and because it would be improper for jurors to testify at all about the effect of any such "outside influence" on the deliberative process. 76a-90a.

Counsel for Petitioner responded that the court could make the threshold determination of whether there was an external influence based on affidavits of Petitioner's attorneys describing the juror interviews, because "none of [the jurors] wanted to give an affidavit." 94a.

The trial court allowed jurors to testify, but *specifically precluded* testimony about the *effect* of any of the Bible consultation on members of the jury.[2]

In the presence of the four jurors who appeared to testify (74a-76a), the trial judge instructed: "[W]e can't go into the effect it had upon the jurors. And we have to be very careful about avoiding the effect it had upon any juror, if any. It's a matter of simply determining . . . what occurred in the jury room." 130a; *see also* 131a ("But we must stay away from what influence it had upon any juror in their verdict in the case.").

During the examination of the four jurors, the court, lawyers and witnesses all adhered to the

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[2] Each juror was sequestered during the testimony of the others. 132a-134a.

court's ruling precluding testimony about the effects of the Bible consultation. *See, e.g.*, 134a-135a ("[Y]ou've been in the court while the Judge made his ruling about the limited inquiry we can make . . . . And I'm going to try to ask questions in such a way that don't get into areas about what the Bible passage, how they effected you."); 150a-151a (juror hesitant to testify for fear of "getting into what happened" because he "didn't want to say anything wrong"); 166a-167a (judge sustaining objection to question eliciting testimony about effect of reading Bible passage on juror); 182a-183a (judge and lawyer colloquy about question that "goes into that area that [the court] said we're not suppose to ask. Were they influenced . . . .").

2. Juror Testimony About Bible Consultation

The testimony of four jurors made clear that: more than one juror brought a Bible into the jury room during deliberations (135a-136a; 201a); at least one juror read Bible passages aloud to a group of jurors (150a-152a; 157a-158a; 166a; 177a; 189a-192a); jurors passed around a Bible with highlighted passages (138a-142a; 146a; 153a-155a); one juror reviewed a specific Bible passage after observing another juror reviewing it (138a-139a, 146a); and one of the Bible passages the jurors considered directs that someone who "strik[es] a person with an object and kill[s] him, as [Petitioner] did to Collins – is a murderer and must be put to death" (21a; 139a-140a).[3]

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[3] Throughout this Petition the term "consultation" is used as shorthand to refer to the various ways in which the jurors'

For instance, juror Mike McHaney testified that another juror, Kenneth Grace, read Bible passages aloud to a group of jurors. 150a-152a, 157a-158a, 166a. He also testified that juror Donna Matheny (whose father recently had died and was not in court) showed him a specific passage from the Book of Numbers, and that he and Matheny later showed that same Bible passage to another juror, Rhonda Robinson. 138a-142a, 146a, 153a-155a.

The other three jurors confirmed many of the details of McHaney's testimony. Two other jurors testified that some jurors brought Bibles into the jury room, and recalled a juror reading the Bible aloud. *See* 177a-179a (juror Symmank); 189a-192a (juror Rodrigues). The fourth juror testified that at least one juror brought a Bible into the jury room and there "were a couple of jurors that did read the Bible." 201a, 204a (juror Webb).

The testimony made clear that some of the Bible consultation occurred during sentencing deliberations. *See, e.g.*, 166a, 189a-190a; 201a; 207a.

3. State Trial Court's Ruling on Motion for New Trial

Following the juror testimony, the trial court judge denied Petitioner's motion for a new trial from the bench:

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reviewed, read from and/or discussed the Bible during their deliberations.

> [T]he ruling of this Court is, that having heard all the evidence pertaining to the occurrence in the jury room in question in reference to the Biblical quotation which is on file in the case, it is the Judgment of this Court that the conduct of the jury was not improper. And that a conscientious, dedicated and car[ing] jury considered this case in accord with the Court's Charge and the instructions of the Court and rendered their verdict in accord with the evidence they heard in this case uninfluenced by any outside influence of any kind shown to the Court in this hearing. And, therefore, the Motion for New Trial is overruled.

234a.

D. State Appeals & State Habeas Proceedings

Petitioner filed a timely appeal to the Texas Court of Criminal Appeals, challenging, *inter alia*, the trial court's ruling on the motion for new trial. Petitioner argued that "[t]he jury's consideration of the Bible in this cause was constitutional error . . . in violation of U.S. Const. amend. VI . . . [and also] violates the Eighth Amendment's prohibition against cruel and unusual punishment." Brief of Appellant on Direct Appeal at 115-16.

The Court of Criminal Appeals rejected Petitioner's appeal, and held the Bible did not constitute an improper outside influence.[4] 286a.

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[4] This Court denied Mr. Oliver's petition for a writ of certiorari. *Oliver v. Texas*, 537 U.S. 1161 (2003).

Petitioner then filed a state post-conviction application for writ of habeas corpus raising, *inter alia*, these same issues. While the application was pending before the Court of Criminal Appeals, Petitioner discovered that a Danish journalist had interviewed Juror Michael Brenneisen about the jury's use of the Bible during its deliberations.[5] *See* 47a. Petitioner notified the court of the existence of this evidence and requested a hearing. The court denied the application, and characterized Petitioner's request for a hearing as an improper "subsequent application," dismissing it as "an abuse of the writ." 288a-289a.[6]

E. Federal Habeas Proceedings

1. The District Court Opinion

Having exhausted his state court remedies (6a),[7] Petitioner filed a federal habeas corpus petition with the United States District Court for the Eastern District of Texas. Petitioner raised the same

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[5] The journalist, Egon Clausen, interviewed Mr. Brenneisen while doing research for his book, ØJE FOR ØJE. Egon Clausen, ØJE FOR ØJE: EN BERETNING FRA DET MODERNES BAGSIDE (Gyldendal) (2003). Mr. Brenneisen told the journalist that jurors were not warned against bringing Bibles to the jury room, that "about 80 percent" of the jurors did so, and that the jurors consulted Bible passages together and compared their teachings to the facts of the case. 326a-329a.

[6] This Court denied Mr. Oliver's petition for a writ of certiorari. *Oliver v. Texas*, 538 U.S. 1001 (2003).

[7] Petitioner had asked the lower federal courts to stay the federal proceedings so that he could seek a hearing in state court based on the new evidence contained in the Brenneisen interview. *See* 47a-51a.

arguments he presented to the state courts, and also sought to obtain an evidentiary hearing based on a sworn transcript of the interview with juror Brenneisen. 47a-48a; 63a-64a.

The district court denied the request for a hearing on the basis that Petitioner had "not provided this court with sworn testimony from the juror or journalist,"[8] and therefore has not established, as required by 28 U.S.C. § 2254(e)(2), "that but for relying on the Bible, no reasonable juror would have answered the special issues in the way that resulted in his receiving a death sentence." 63a-64a. The court then rejected the habeas petition, construing the trial court's ruling on the motion for new trial as a "pure question of fact" that could be dislodged only upon showing that the decision was "based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceedings" under 28 U.S.C. § 2254(d)(2), and concluding the state trial court's "factual determination" was not unreasonable. 61a-65a.

On February 2, 2007, the district court granted Petitioner's request for a Certificate of Appealability with respect to the issues related to the jury's consultation of the Bible. 67a-69a.

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[8] As the Fifth Circuit noted, "Clausen swore under oath in Denmark that the transcript was a true representation of his interview with Brenneisen." 6a n.5.

2. The Fifth Circuit Opinion

Petitioner appealed to the Fifth Circuit, which issued an opinion regarding his "claim that the jury improperly consulted the Bible when deliberating during the sentencing phase of his trial."[9] 7a-8a.

The Fifth Circuit first concluded that this Court's decisions in *Parker v. Gladden*, 385 U.S. 363 (1966), *Turner v. Louisiana*, 379 U.S. 466 (1965), and *Remmer v. United States*, 347 U.S. 227 (1954), "clearly established a constitutional rule forbidding a jury from being exposed to an external influence." 12a.

Finding it "clear" those precedents apply to Petitioner's claim, the Fifth Circuit held that "when a juror brings a Bible into the deliberations and points out to her fellow jurors specific passages that describe the very facts at issue in the case, the juror has crossed an important line." 14a, 20a.[10]

In reaching this conclusion, the Fifth Circuit observed that the jurors deliberating about

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[9] The Fifth Circuit had previously addressed the district court's denial of a hearing on the new evidence, and a number of other unrelated claims presented by Petitioner. *See Oliver v. Quarterman*, 254 F. App'x 381 (5th Cir. 2007), reproduced at 31a.

[10] The court acknowledged this Court has not previously addressed the precise facts of Petitioner's case, but held "it is clear that the prohibition of external influences . . . applies to this factual scenario," because, it would be unreasonable to refuse to extend the rule to this "'new context where it should apply.'" 14a (quoting *Williams v. Taylor*, 529 U.S. 362, 407 (2000)).

Petitioner's sentence "referenced a specific [Bible] passage that stated that someone who engages in a particular act – striking a person with an object and killing him, as [Petitioner] did to Collins – is a murderer and must be put to death," and "the Bible passage in this instance was evidence of the circumstances of the offense that militates for . . . the imposition of the death penalty." 21a-22a (quotation omitted).

Having concluded Petitioner's Sixth Amendment rights had been violated by juror consultation of the Bible during sentencing deliberations,[11] the Fifth Circuit then considered whether the violation should be deemed "harmless," notwithstanding the constitutional error.

Noting that the Petitioner's claim was before it on habeas review rather than direct appeal, the court observed "we do not use the normal harmless error analysis," and proceeded to apply the standard set out in *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) – whether the constitutional error had a "substantial and injurious effect or influence in determining the jury's verdict." 24a. The court

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[11] While agreeing with Petitioner that his Sixth Amendment rights had been violated, the Fifth Circuit rejected Petitioner's Eighth Amendment claims. Petitioner maintains that the imposition of the death penalty following the juror consultation of the Bible during sentencing deliberations at issue in this case also violates the Eighth Amendment. Moreover, as this Court recognizes "due process alone has long demanded that, if a jury is to be provided the defendant . . . the jury must stand impartial and indifferent to the extent required by the Sixth Amendment." *Morgan v. Illinois*, 504 U.S. 719, 727 (1992).

further observed that, under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), it was required to defer to any relevant state court factual findings unless Petitioner presented "clear and convincing" evidence to the contrary. 27a.

The Fifth Circuit quoted the state trial judge's oral ruling on Petitioner's motion for a new trial, in which he asserted that the jurors had "rendered their decision 'in accord with the evidence they heard in this case uninfluenced by any outside influence of any kind shown to the Court in this hearing.'" 27a. From this, the Fifth Circuit concluded that, "[i]n essence, the state court made a finding that the Bible did not prejudice the jury's decision." 27a. The Fifth Circuit made no mention of the fact that before and during that hearing, the state trial court judge precluded any juror testimony about the effect of the Bible consultation, nor did the Fifth Circuit explain how the state court could have rendered a factual finding about a subject that was specifically excluded from discussion during the hearing.

Because it believed it was required to defer to the state trial court's "finding" regarding the effect of juror consultation and discussion of the Bible, the Fifth Circuit affirmed the district court's judgment denying habeas relief. 30a.

Petitioner moved for rehearing. On October 3, 2008, the Fifth Circuit denied the motion. 53a-54a.

REASONS FOR GRANTING THE PETITION

Petitioner was sentenced to death by jurors who consulted, discussed and read aloud Bible passages while deliberating about his fate.

This was not an isolated incident. Numerous federal and state courts have been confronted with appeals or requests for post-conviction relief based on juror consultation of the Bible.[12] Courts

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[12] *See, e.g., Fields v. Brown*, 503 F.3d 755, 781 (9th Cir. 2007) (*en banc*), *cert. denied sub nom., Fields v. Ayers*, 128 S. Ct. 1875 (2008); *Billings v. Polk*, 441 F.3d 238, 248-49 (4th Cir. 2006), *cert. denied*, 127 S. Ct. 932 (2007); *Lenz v. Washington*, 444 F.3d 295, 310-12 (4th Cir. 2006), *cert. denied sub nom. Lenz v. Kelly*, 548 U.S. 928 (2006); *Lynch v. Polk*, 204 F. App'x 167, 173-75 (4th Cir. 2006), *cert. denied.*, 127 S. Ct. 3021 (2007); *Robinson v. Polk*, 438 F.3d 350, 357-66 (4th Cir. 2006), *reh'g denied*, 444 F.3d 225, *cert. denied*, 127 S. Ct. 514 (2006); *McNair v. Campbell*, 416 F.3d 1291, 1301-09 (11th Cir. 2005), *cert. denied*, 547 U.S. 1073 (2006); *Burch v. Corcoran*, 273 F.3d 577, 590-91 (4th Cir. 2001), *cert. denied*, 535 U.S. 1104 (2002); *Peterson v. Polk*, No. 1:03-CV-00651, 2007 WL 1232076, *8-*12 (M.D.N.C. April 26, 2007), *certificate of appealability denied sub nom. Peterson v. Branker*, No. 07-16 (4th Cir. May 8, 2008), *cert. filed, Peterson v. Branker*, No. 08-7039; *United States v. Battle*, 264 F. Supp. 2d 1088, 1192-93 (N.D. Ga. 2003); *Jones v. Kemp*, 706 F. Supp. 1534, 1558-60 (N.D. Ga. 1989); *Lucero v. Texas*, 246 S.W.3d 86, 94-95 (Tex. Crim. App. 2008), *cert. denied* 129 S. Ct. 80 (2008); *Willoughby v. Commonwealth*, Nos. 2006-SC-000071-MR, 2006-SC-000100-MR, 2007 WL 2404461, *1 (Ky. Aug. 23, 2007); *California v. Williams*, 148 P.3d 47, 77-81 (Cal. 2006), *cert. denied sub nom. Williams v. California*, 128 S. Ct. 179 (2007); *Colorado v. Harlan*, 109 P.3d 616 (Colo. 2005), *cert. denied*, 546 U.S. 928 (2005); *California v. Danks*, 82 P.3d 1249 (Cal. 2004), *cert. denied sub nom. Danks v. California*, 543 U.S. 961 (2004); *Ohio v. Franklin*, No. 19041, 2002 WL 1000415, *11-*12 (Ohio App. May 17, 2002), *cert.*

confronting these situations have adopted divergent views about how to evaluate claims for relief based on such juror conduct.

While this Court has previously denied petitions in some of the cases where juror consultation of the Bible was at issue, review of this case is particularly appropriate for two reasons.

First, the Fifth Circuit's decision in this case takes sides on a pair of important issues related to juror consultation of the Bible during sentencing deliberations, about which federal courts of appeals are divided. *See* SUP. CT. R. 10(a).

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denied, 127 S. Ct. 362 (2006); *Kansas v. Kleypas*, 40 P.3d 139, 204-05 (Kan. 2001), *cert. denied*, 537 U.S. 834 (2002); *Glossip v. Oklahoma*, 29 P.3d 597, 604-05 (Okla. Crim. App. 2001); *Young v. Oklahoma*, 12 P.3d 20, 47-49 (Okla. Crim. App. 2000); *South Carolina v. Kelly*, 502 S.E.2d 99 (S.C. 1998), *cert. denied*, 525 U.S. 1077 (1998); *North Carolina v. Barnes*, 481 S.E.2d 44, 67-68 (N.C. 1997), *cert denied sub nom. Chambers v. North Carolina*, 522 U.S. 876 (1997) and *sub nom. Barnes v. North Carolina*, 523 U.S. 1024 (1998); *Bieghler v. Indiana*, 690 N.E.2d 188, 203 (Ind. 1997), *cert. denied*, 525 U.S. 1021 (1998); *California v. Mincey*, 827 P.2d 388, 424-26 (Cal. 1992), *cert. denied*, 506 U.S. 1014 (1992); *Grooms v. Kentucky*, 756 S.W.2d 131, 142 (Ky. 1988); *Jones v. Francis*, 312 S.E.2d 300, 303 (Ga. 1984), *cert. denied*, 469 U.S. 873 (1984); *Tennessee v. Harrington*, 627 S.W.2d 345, 350 (Tenn. 1981), *cert. denied*, 457 U.S. 1110 (1982); *Keen v. Tennessee*, No. W2004-02159-CCA-R3-PD, 2006 WL 1540258, *28-*32 (Tenn. Crim. App. June 5, 2006) *cert. denied*, 127 S. Ct. 2250 (2007); *Burns v. Tennessee*, No. W2004-00914-CCA-R3-PD, 2005 WL 3504990, *44-*46 (Tenn. Crim. App. Dec. 21, 2005); *Ackerman v. Florida*, 737 So.2d 1145, 1148 (Fla. App. 1999), *rev. denied*, 751 So.2d 50 (Fla. 1999).

Second, although the Fifth Circuit correctly concluded this Court's clearly established precedents forbid the juror conduct at issue here, it nevertheless erred when it deferred to a non-existent factual determination by the state trial court – and therefore applied the incorrect standard of review.

Because Petitioner has been sentenced to death in contravention of his constitutional rights, and has been denied habeas relief based on a misapplication of 28 U.S.C. § 2254(e)(1), the Petition should be granted. *See* SUP. CT. R. 10(a), (c).

I. THE FIFTH CIRCUIT'S DECISION EXTENDS A CONFLICT AMONG FEDERAL COURTS OF APPEALS REGARDING WHETHER JURY CONSULTATION OF THE BIBLE DURING DELIBERATIONS IS A CONSTITUTIONALLY-PROHIBITED "EXTERNAL INFLUENCE" ON THE JURY

As the Fifth Circuit correctly observed, this Court "has clearly established a constitutional rule forbidding a jury from being exposed to an external influence." 12a. *See, e.g.*, *Parker v. Gladden*, 385 U.S. 363 (1966), *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) ("The requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury."), *Remmer v. United States*, 347 U.S. 227, 229 (1954) ("any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial"); *see also Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due process means a jury capable and

willing to decide the case *solely* on the evidence before it . . . .") (emphasis added).

Applying that clearly established constitutional rule to this case, the Fifth Circuit concluded that the jury's consultation of the Bible during the sentencing phase of the trial amounted to an external influence on the jury's deliberations, and thereby deprived Petitioner of his Sixth Amendment rights. 14a, 22a-23a.

Unlike the Fifth Circuit, the Fourth Circuit has repeatedly rejected the view that jury consultation of the Bible during jury deliberations constitutes an improper external influence.[13] *See, e.g., Robinson v. Polk*, 438 F.3d 350, 363-64 (4th Cir. 2006) (holding Bible passages did not qualify as "external influences" under the Sixth Amendment because they had no "evidentiary relevance to the jury's determination of the existence of these aggravating and mitigating circumstances," and in any event "the reading of Bible passages invites the listener to examine his or her own conscience from within . . . ."), *reh'g denied* 444 F.3d 225, *cert. denied*, 127 S. Ct. 514 (2006); *Billings v. Polk*, 441 F.3d 238, 248 (4th Cir. 2006) (rejecting claim based on juror consultation of Bible at home the night before sentencing deliberations because "it is not at all clear that a juror's consultation of the Bible even

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[13] In reaching that conclusion, the Fourth Circuit remarked it could find "no Supreme Court case addressing whether allegations of Bible reading fall into either of these categories" of improper external influences on the jury. *Robinson v. Polk*, 438 F.3d 350, 363-64 (4th Cir. 2006).

constitutes a 'private communication, contact or tampering' with the jury under *Remmer*"), *cert. denied*, 127 S. Ct. 932 (2007); *see also Lenz v. Washington*, 444 F.3d 295, 310-12 (4th Cir. 2006), *cert. denied sub nom. Lenz v. Kelly*, 548 U.S. 928 (2006); *Burch v. Corcoran*, 273 F.3d 577, 590-91 (4th Cir. 2001) (juror's reading from Bible during sentencing deliberations "did not constitute an improper jury communication").[14]

The Ninth Circuit appears to embrace the Fourth Circuit's approach.[15] A divided *en banc* panel of that court rejected a constitutional claim of juror misconduct, where the jury foreperson had consulted the Bible and made notes "for" and "against" the death penalty (including verbatim copies of several Bible passages), and then shared those notes with fellow jurors during sentencing deliberations. *Fields v. Brown*, 503 F.3d 755 (9th Cir. 2007) (*en banc*), *cert. denied sub nom. Fields v. Ayers*, 128 S. Ct. 1875 (2008).[16] Observing "there is no Supreme Court

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[14] Within the Fourth Circuit there is considerable dispute about that court's approach to constitutional claims based on juror consultation of the Bible. *See Robinson v. Polk*, 444 F.3d 225, 226 (4th Cir. 2006) (*per curiam*) ("Judges Michael, Motz, King, and Gregory voted to rehear the case *en banc*, and Chief Judge Wilkins and Judges Widener, Wilkinson, Niemeyer, Luttig, Williams, Traxler, Shedd, and Duncan voted against rehearing *en banc*.").

[15] *See Robinson*, 438 F.3d at 363 n.16 ("We note that the Ninth Circuit recently reached a similar conclusion that the Bible is not 'extrinsic, factual material' to a jury.").

[16] Like in the Fourth Circuit, the issue is the subject of substantial disagreement among court members. The *Fields* decision divided an *en banc* panel of fifteen Ninth Circuit

authority on Biblical references in the jury room,"[17] the panel majority distinguished this Court's leading "external influence" decisions, and concluded that the Biblical verses in the foreperson's notes are "notions of general currency that inform the moral judgment that capital-case jurors are called upon to make."[18] 503 F.3d at 778-80 (distinguishing *Mattox v. United States*, 146 U.S. 140 (1892), *Remmer*, *Turner* and *Parker*).[19]

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judges 9-6. Judge Gould filed an opinion concurring in part and dissenting on the Bible consultation issue, joined by Judges McKeown and Wardlaw. 503 F.3d at 784 ("[T]he majority argues that Bible verses are not similar to extrinsic materials that we and the Supreme Court have previously found prejudicial because they are 'notions of general currency that inform the judgment' of capital jurors. This argument is unpersuasive.") (citation omitted). Judge Berzon filed a separate dissenting opinion, joined by Judges Reinhardt and Thomas, which similarly concluded the jury improperly considered extrinsic material. *Id.* at 789-813.

[17] *Cf. Robinson*, 444 F.3d at 230 (Wilkinson, J., concurring in denial of rehearing *en banc*) ("Whether the presence of a Bible is an external influence upon the jury or simply a part of the jury's internal processes is a question the Supreme Court has not even broached, much less settled.").

[18] After setting out several reasons why the juror conduct at issue was not improper, the panel majority added: "[t]hat said, we do not need to decide whether there was juror misconduct because even assuming there was, we are persuaded that [the jury foreperson's] notes had no substantial and injurious effect or influence in determining the jury's verdict." 503 F.3d at 781.

[19] The Tenth Circuit seemingly agrees with the Fourth and Ninth Circuits, having denied a certificate of appealability for a claim based on the "jury's consulting a Bible during its deliberations" because the petitioner failed to show the claim makes a "substantial showing of the denial of a constitutional

Meanwhile, the Fifth Circuit's decision largely conforms with the Eleventh Circuit's decision in *McNair v. Campbell*, 416 F.3d 1291, 1301, 1308 (11th Cir. 2005), *cert. denied*, 547 U.S. 1073 (2006) (finding jurors had "considered extrinsic evidence during deliberations" where a juror "brought a Bible into the jury room during deliberations, read aloud from it, and led the other jurors in prayer").[20]

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right." *Neill v. Gibson*, 278 F.3d 1044, 1064 n.8 (10th Cir. 2001).

[20] The Supreme Courts of Colorado and California agree with the Fifth Circuit that juror consideration of the Bible during deliberations violates the guarantee of a fair trial. *See Colorado v. Harlan*, 109 P.3d 616, 629 (Colo. 2005) ("The trial court properly found that one or more jurors introduced one or more Bibles, a Bible index, and notes of Bible passages into the jury room for consideration by other jurors . . . . [T]hese materials were extraneous and their introduction was improper and constituted misconduct."), *cert. denied*, 546 U.S. 928 (2005); *California v. Williams*, 148 P.3d 47, 79 (Cal. 2006) ("This court has held that reading aloud from the Bible or circulating biblical passages during deliberations is misconduct."), *cert. denied*, 128 S. Ct. 179 (2007). Other state courts of last resort have suggested that juror consultation of the Bible during deliberations is improper. *See, e.g., Tennessee v. Harrington*, 627 S.W.2d 345, 350 (Tenn. 1981) (jury foreman "buttress[ing] his argument for imposition of the death penalty by reading to the jury selected biblical passages . . . was error which would have required a new sentencing hearing"), *cert. denied*, 457 U.S. 1110 (1982); *Grooms v. Kentucky*, 756 S.W.2d 131, 142 (Ky. 1988) ("[O]n retrial the court is instructed that jurors should not be allowed to take Bibles into the jury room with them."); *Glossip v. Oklahoma*, 29 P.3d 597, 605 (Okla. Crim. App. 2001) ("Any outside reference material, including but not limited to Bibles or other religious documents . . . should not be taken into or utilized during jury deliberations.").

* * * *

Jury consultation of the Bible during sentencing deliberations is a recurring problem – which most often arises in the context of capital cases. Because lower courts are divided about the threshold issue of whether Bible consultation constitutes a constitutionally-proscribed "external influence" on the jury, this Court should grant the Petition, and provide much needed guidance to the lower courts.

II. FEDERAL COURTS OF APPEALS DISAGREE ABOUT THE APPLICABLE STANDARD FOR EVALUATING POTENTIAL PREJUDICE TO THE DEFENDANT RESULTING FROM JUROR CONSULTATION OF THE BIBLE

Having determined the jury's consultation of the Bible was a constitutional error, the Fifth Circuit considered whether that error was harmless. 23a-30a.

A. Federal Courts of Appeals Disagree About the Appropriate Standard for Ascertaining Prejudice From Juror Consultation of the Bible

As the Fifth Circuit itself observed, "[n]ot all circuits are in agreement regarding the appropriate standard for determining prejudice when a jury improperly consults the Bible during deliberations." 24a n.13.

In *McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005), the Eleventh Circuit evaluated juror consultation of the Bible during deliberations in the context of a habeas petition, and determined that

"[u]nder federal law, any evidence that does not 'come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel' is *presumptively prejudicial*." 416 F.3d at 1307 (quoting *Turner v. Louisiana*, 379 U.S. 466, 473 (1965), and citing *Remmer v. United States*, 347 U.S. 227, 229 (1954)) (emphasis added). "In order to give rise to this presumption, a defendant need only demonstrate that jurors had contact with extrinsic evidence." *Id.* Once the defendant has established such contact, "the State bears the burden of rebutting the presumption by showing that the jurors' consideration of the extrinsic evidence was harmless to the defendant." *Id.*

Acknowledging its departure from the Eleventh Circuit approach, in this case the Fifth Circuit held that Petitioner is entitled to relief only if the constitutional error had a "substantial and injurious effect of influence in determining the jury's verdict." 24a (citing *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). In so doing, the Fifth Circuit joined the Ninth Circuit in concluding that, on habeas review, this Court's *Brecht* standard controls when ascertaining whether prejudice arises from jury consultation of the Bible. *See Fields v. Brown*, 503 F.3d 755, 781 (9th Cir. 2007) (*en banc*).

Petitioner submits the Fifth Circuit erred in this case by applying the *Brecht* standard to evaluate potential prejudice from the constitutional error in question.

As explained below, once it is established that jurors consulted the Bible during sentencing

deliberations, the imposition of a harmless error analysis is inappropriate. Petitioner contends in such cases a court should presume the Bible consultation influenced the deliberative process, and vacate the sentence. If, however, a harmless error analysis is to be applied, the Eleventh Circuit's standard is more appropriate than the *Brecht* standard applied by the Fifth Circuit in this case, and the by Ninth Circuit in *Fields*.

As this Court recognized in *Brecht* itself, there is a "spectrum of constitutional errors." 507 U.S. at 629. If any harmless error examination is to be conducted in cases where jurors consult the Bible during deliberations – out of the sight of the parties and the court – that assessment should be governed by a less onerous standard than *Brecht's* "substantial and injurious effect or influence" requirement. *Cf. Chapman v. California*, 386 U.S. 18 (1967) (standard for deciding whether to set aside conviction because of constitutional error is whether error "was harmless beyond a reasonable doubt").

Because federal courts of appeals disagree about the appropriate standard for ascertaining prejudice from juror consultation of the Bible, this Court should grant the Petition, and provide guidance to the lower courts.

B. This Court Should Consider Whether Juror Consultation of the Bible During Sentencing Deliberations in a Capital Case Gives Rise to an Irrebuttable Presumption of Prejudice

As this Court has recognized, in limited circumstances it is appropriate to presume an adverse effect from a constitutional error, without

requiring a showing of actual harm. *See, e.g.*, *Deck v. Missouri*, 544 U.S. 622, 635 (2005) (shackling of defendant in courtroom during trial); *Sullivan v. Louisiana*, 508 U.S. 275, 279-81 (1993) (erroneous reasonable doubt instruction); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984) (denial of right to self-representation); *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980) (counsel "actively represented conflicting interests"); *Geders v. United States*, 425 U.S. 80, 91 (1976) (defendant denied access to counsel between direct and cross-examination); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) (complete deprivation of right to counsel); *Tumey v. Ohio*, 273 U.S. 510, 535 (1927) (trial conducted by biased judge).

While such errors are "the exception and not the rule," *Rose v. Clark*, 478 U.S. 570, 578 (1986), Petitioner submits that in connection with consideration of the appropriate standard for ascertaining prejudice resulting from jury consultation of the Bible, this Court should consider whether juror consultation of the Bible during the sentencing phase *of a capital case* should give rise to irrebuttable presumption of prejudice.[21]

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[21] Some state courts of last resort have suggested that error of the sort at issue in this case is so serious that it warrants setting aside the jury's sentence, without requiring a showing of prejudice. For instance, the Tennessee Supreme Court, faced with a situation in which "the jury foreman buttressed his argument for imposition of the death penalty by reading to the jury selected biblical passages," stated that "[h]is action, of course, was error which *would have required a new sentencing hearing* absent the error in excluding jurors from cause in violation of the *Witherspoon* standard." *Tennessee v.*

When evaluating whether a constitutional error warrants redress without inquiry into its effects in a particular case, this Court has generally distinguished between "structural defects in the constitution of the trial mechanism" and "trial errors" – typically presuming prejudice in the former cases, and applying a case-specific harmless error analysis in the latter cases. *See Arizona v. Fulminante*, 499 U.S. 279, 307-09 (1991).

The "common thread" connecting cases deemed amenable to a harmless error analysis "is that each involved 'trial error' – error which occurred during the presentation of the case to the jury, and which may therefore be *quantitatively assessed* in the context of other evidence presented in order to determine whether its admission was harmless . . . ." *Fulminante*, 499 U.S. at 307-08 (emphasis added).

Juror consultation of the Bible during sentencing deliberations is a constitutional error not readily susceptible to harmless error analysis. Although the fact of juror conduct can sometimes be uncovered through hearings and testimony, the *effects* of Bible consultation cannot be "quantitatively assessed" in the way that "trial errors" may be. Once the Bible becomes part of the deliberative process, its impact on deliberating jurors is a matter of speculation, without an accompanying record from which juror decisionmaking reasonably can be inferred. *See Riggins v. Nevada*, 504 U.S. 127 (1992) (refusing to apply harmless error analysis to forced

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Harrington, 627 S.W.2d 345, 350 (Tenn. 1981) (emphasis added).

administration of antipsychotic mediation during defendant's trial because "[e]fforts to prove or disprove actual prejudice . . . would be futile, and guesses whether the outcome of the trial might have been different . . . would be purely speculative . . . . [T]he precise consequences of forcing antipsychotic medication upon [the defendant] cannot be shown from a trial transcript.").[22]

Requiring a case-specific harmless error analysis of the effects of juror Bible consultation is also problematic because this issue will almost invariably arise in the context of a claim that the juror conduct was improper – as it did here. This may engender juror defensiveness or antagonism toward the Defendant – neither of which is conducive to uncovering the truth about the actual effect of the Bible consultation from the jurors themselves. *Cf. Smith v. Phillips*, 455 U.S. 209, 221-22 (1982) (O'Connor, J., concurring) ("Determining whether a juror is biased or has prejudiced a case is difficult, partly because the juror may have an interest in concealing his own bias, and partly because the juror may be unaware of it. The problem may be

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[22] When jurors deliberately look beyond the evidence presented at trial and consult the Bible for guidance, a defendant has irretrievably been deprived of his constitutional rights. *Cf. Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("Due process means a jury capable and *willing* to decide the case *solely* on the evidence before it . . . .") (emphasis added); *see also Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) (rejecting application of harmless error inquiry when jury rendered verdict based on constitutionally-deficient "reasonable doubt" instruction because "there has been no jury verdict within the meaning of the Sixth Amendment").

compounded when a charge of bias arises from juror misconduct, and not simply from attempts of third parties to influence a juror . . . . [I]n certain instances a hearing may be inadequate for uncovering a juror's biases, leaving serious question whether the trial court had subjected the defendant to manifestly unjust procedures resulting in a miscarriage of justice.").

The problem of uncovering the truth about the effect of juror Bible consultation is compounded by the fact that inquiry into juror deliberations is substantially limited. *See Mattox v. United States*, 146 U.S. 140, 149 (1892) ("[A] juryman may testify to any facts bearing upon the question of the existence of any extraneous influence, although not as to how far that influence operated upon his mind.") (quotation omitted); Fed. R. Evid. 606(b) ("a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes . . . ."); *see also* Tex. R. Evid. 606(b); *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 375 (Tex. 2000) (noting Texas Rule of Evidence 606(b) is "designed to balance concerns about the threat of jury misconduct with the threat from post-verdict juror investigation and impeachment of verdicts"). In this case, the trial court imposed precisely such a limitation on the testimony of the jurors who appeared at the hearing on Petitioner's motion for a new trial.

Adopting a presumption of prejudice once it is established that jurors consulted the Bible during sentencing deliberations in a capital case would be consistent with this Court's recognition of the need for special procedural safeguards in administering the death penalty. *See, e.g., Bullington v. Missouri*, 451 U.S. 430, 445-46 (1981) (Double Jeopardy Clause applicable to capital sentencing proceedings); *see also Roper v. Simmons*, 543 U.S. 551, 568 (2005) ("Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force."); *Atkins v. Virginia*, 536 U.S. 304, 317 (2002) (discussing "procedural protections that our capital jurisprudence steadfastly guards").

Such a rule would also further the "'acute need' for reliable decisionmaking when the death penalty is at issue." *Deck v. Missouri*, 544 U.S. 622, 632 (2005) (citing *Monge v. California*, 524 U.S. 721, 732 (1998)); *see also Ring v. Arizona*, 536 U.S. 584, 605-06 (2002) ("'Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.'") (quoting *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988)); *cf. Robinson v. Polk*, 444 F.3d 225, 227 (4th Cir. 2006) (Wilkinson, J., concurring in denial of rehearing *en banc*) (observing the Bible's "place as a canon of scriptural authority is so powerful that it threatens to supplant the individualized sentencing inquiry into the nature and consequences of the crime and the particular aggravating and mitigating circumstances brought forward in the evidence"); *Robinson v. Polk*, 438 F.3d 350, 366 (4th Cir. 2006) ("[B]ecause the Bible

occupies a unique place in the moral lives of those who believe in it, its teachings cannot blithely be lumped together with a private communication, contact, or tampering with a juror without clear guidance from the Supreme Court.").

III. THE FIFTH CIRCUIT MISAPPLIED OR CONTRAVENED FEDERAL LAW BY DEFERRING TO A FACTUAL "FINDING" NEVER MADE BY THE STATE TRIAL COURT, AND THEREFORE ERRONEOUSLY IMPOSED A HEIGHTENED STANDARD FOR PROOF OF HARM RESULTING FROM THE DENIAL OF PETITIONER'S CONSTITUTIONAL RIGHTS

The Fifth Circuit erroneously determined that the state trial court "made a factual finding regarding the effect of the Bible on the jury." 27a. As a result, the court reviewed Petitioner's habeas claim under the deferential standard imposed by AEDPA, 28 U.S.C. § 2254(d), and accordingly denied the claim for relief because "he has not presented clear and convincing evidence to rebut the presumption of correctness" due the "state court's factual finding . . . ." 29a-30a.

The state court did *not* make any factual finding about the *effect* of the Bible passages on the jurors' deliberations. On the contrary, the state trial court limited testimony to the "nature and the circumstances under which" the Bible passage was "considered or was before . . . the jury," and *specifically precluded* any testimony about "the effect it had upon the jurors." 129a-130a.

Before hearing any testimony at all, the state court admonished both parties that "we have to be very careful about avoiding the effect it had upon any juror," 130a; *see also* 131a ("But we must stay away from what influence it had upon any juror in their verdict in the case."), and the ruling was adhered to during testimony. *See, e.g.*, 134a-135a, 150a-151a; 166a-167a; 182a-183a.

It is therefore obvious that the court could not have found juror consultation of the Bible had no effect on the jurors or their deliberations, because the court received no evidence from which it could reasonably draw such a conclusion.[23]

The Fifth Circuit did correctly observe the state trial court judge stated from the bench that the

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[23] The Fifth Circuit cited as support for the view the consultation of the Bible had no impact on the jurors that "the court instructed the jury that '[i]n deliberating upon the cause you are not to refer to or discuss any matter or issue not in evidence before you . . . .'" 29a. The Fifth Circuit itself identified one significant flaw in this argument – "the jurors disobeyed the court's instructions ['you are not to refer to or discuss any matter or issue not in evidence before you'] by consulting the Bible." 29a n.18. Another problem, which the Fifth Circuit seemingly overlooked, is that this instruction was issued only preceding deliberations as to guilt. *See* 343a. The court failed to give such instructions to the jury prior to sentencing deliberations. *See* 345a-350a; *see also* 192a ("Q. ... You got no instructions either way concerning how to use the Bible verses, did you? A. Correct."). Both the absence of this admonition in the jury charge for sentencing, and the fact that numerous jurors referred to and/or discussed the Bible, cast serious doubt on the state trial court's assertion that the jury "considered this case in accord with the Court's Charge and the instructions." 234a.

jurors were "uninfluenced by any outside influence of any kind." 27a. The Fifth Circuit described this as – "[i]n essence" – a "finding that the Bible did not prejudice the jury's decision." 27a. Yet the Fifth Circuit's opinion makes no mention of the fact that state trial court precluded any testimony about the effects of the Bible consultation during the hearing on Petitioner's motion for new trial – or of the fact that no such testimony was provided. This limitation on the scope of the evidence is incompatible with an interpretation of the state trial court's oral ruling as a "finding that the Bible did not prejudice the jury's decision." 27a.[24]

The Fifth Circuit's erroneous conclusion that the state court found "the Bible did not prejudice the jury's decision" materially altered its harmless error analysis. Specifically, this mistake led the court to presume the constitutional error in question was harmless, and place the burden on Petitioner to demonstrate otherwise through "clear and convincing evidence." *Cf.* 26a-27a ("While the facts before us regarding the jury's use of the Bible are perhaps more egregious than in these previous cases, the procedural posture here constrains our analysis.").

Absent this error, the Fifth Circuit would have undertaken a prejudice analysis consistent with this

---

[24] Even if the state trial court did intend to render a factual finding "that the Bible did not prejudice the jury's decision," that factual determination clearly would be unreasonable "in light of the evidence presented [and not presented because it was precluded] in the State court proceeding." 28 U.S.C. § 2254(d)(2).

Court's precedents. And while Petitioner contends that the Fifth Circuit should have either presumed prejudice or employed a standard like the "harmless beyond a reasonable doubt" standard of *Chapman*, even if the court had instead employed the *Brecht* standard on its own (without also deferring to a supposed state court finding that the constitutional error in question had no prejudical effect), there is considerable reason to doubt the Fifth Circuit would have found the constitutional error here "harmless" – particularly since *Brecht* itself "imposes a significant burden of persuasion *on the State*." *Fry v. Pliler*, 127 S. Ct. 2321, 2328 (2007) (Stevens, J., concurring in part and dissenting in part) (emphasis added).

For instance, even while defending a finding of harmless error, the Fifth Circuit acknowledged: "[t]he Bible may have influenced the jurors simply to answer the questions in a manner that would ensure a sentence of death" (22a), the evidence of the effect of the Bible consultation on the jurors "cuts both ways" (29a), and consultation of the Bible "potentially tainted the jury's decision" (29a n.18).

This suggests that had it not erroneously deferred to what it believed was a factual determination by the state trial court, the Fifth Circuit likely would have found the constitutional error in question was not harmless. *Cf. Parker v. Gladden*, 385 U.S. 363, 366 (1966) ("[P]etitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors."); *Fry*, 127 S. Ct. at 2327 n.3 ("We have previously held that, when a court is 'in virtual equipoise as to the harmlessness of the error' under the *Brecht* standard, the court should

'treat the error . . . as if it affected the verdict.") (quoting *O'Neal v. McAninch*, 513 U.S. 432, 435 (1995)).

Because the Fifth Circuit incorrectly applied the AEDPA, and therefore improperly denied Petitioner relief, this Court should grant the Petition to provide appropriate guidance regarding the implementation of this important statute.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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January 5, 2009

Supreme Court, U.S.
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No. 08-____

IN THE
SUPREME COURT OF THE UNITED STATES

KHRISTIAN OLIVER,
Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-70006

United States Court of Appeals
Fifth Circuit
FILED
AUGUST 14, 2008
Charles R. Fulbruge III
Clerk

KHRISTIAN OLIVER

Petitioner-Appellant

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Texas

Before SMITH, GARZA, and PRADO, Circuit Judges.

PRADO, Circuit Judge:

Khristian Oliver ("Oliver") seeks habeas corpus relief from his sentence of death for the murder of Joe Collins ("Collins"). Oliver argues that the jury violated his rights under the Sixth and Eighth Amendments by considering passages from the Bible during the sentencing phase of its deliberations. Although the jury improperly consulted the Bible, the state court found that the Bible did not influence the jury's decision. As Oliver has not presented clear and convincing evidence to rebut this factual finding, we AFFIRM the district court's decision to deny the writ.

I. FACTUAL AND PROCEDURAL BACKGROUND

Oliver shot Collins after Collins came home to find Oliver burglarizing his house.[1] The jury learned that while Collins was lying on the ground after being shot, Oliver struck Collins several times in the head with a rifle butt. At the trial, the medical expert testified that although Collins likely died from the gunshot wounds, the attack with the rifle butt also could have been fatal by itself. A jury convicted Oliver of capital murder based on his killing of Collins during the commission of a

---

[1] The district court recounted the facts of the murder in detail, and as we repeated those details in our prior opinion in this case, we need not do so again here. *See Oliver v. Quarterman*, 254 F. App'x 381, 383 (5th Cir. 2007) (per curiam) (unpublished).

burglary. The jury sentenced him to death. Oliver filed a motion for a new trial regarding his sentence, arguing that the jurors, during the penalty phase of their deliberations, improperly consulted the Bible.

At a state court evidentiary hearing on his motion for a new trial, Oliver called four jurors to testify. Kenneth McHaney stated that during the jury's deliberations, one juror, Kenneth Grace, read the Bible aloud to a small group of jurors in the corner of the jury room. McHaney also testified that fellow juror Donna Matheny mentioned to him that the Bible contained a passage discussing who is a murderer and who should be put to death, and that he asked Matheny if he could read her Bible, which Matheny had highlighted.[2] McHaney recalled reading verses pertaining to the importance of obeying the law of the land, the commandment that "thou shalt not kill," and the passage Matheny pointed out that discussed who is a murderer and who deserves a death sentence. In particular, he recalled reading a passage that says that if a man strikes someone with an iron object so that he dies, then he is a murderer and should be put to death.[3]

---

[2] Neither Grace nor Matheny testified at the hearing.

[3] The parties agree that the specific Bible passage at issue came from the Book of Numbers:

> And if he smite him with an instrument of iron, so that he die, he is a murderer: the murderer shall surely be put to death.
>
> And if he smite him with throwing a stone, wherewith he may die, and he die, he is a murderer: the murderer shall surely be put to death.

McHaney also witnessed juror Rhonda Robinson reading the same passage from the Bible.[4] McHaney believed that there were approximately four Bibles in the jury room, but he could not recall the exact number. He said that many jurors had Bibles with them because they went to church or Bible study at night.

Juror Maxine Symmank stated that she read the Bible to herself while in the jury room and that there was another male juror who read the Bible aloud to a small group of jurors at one end of the table. Symmank could not recall exactly when she read the Bible, although she believed it was after the jury made its punishment determination while the jurors waited for the court to reconvene. She admitted, however, that it is possible that she also read the Bible during earlier parts of the proceedings. Symmank recalled reading the same passage that McHaney had consulted from the Book of Numbers: "And if he smite him with an instrument of iron, so that he die, he is a murderer: the murderer shall surely be put to death." Symmank had decided to read this passage after a fellow juror opened the Bible to that page. Symmank confirmed, however, that no juror explicitly stated that the jury should

---

> Or if he smite him with an hand weapon of wood, wherewith he may die, and he die, he is a murderer: the murderer shall surely be put to death.
>
> The revenger of blood himself shall slay the murderer: when he meeteth him, he shall slay him.

Numbers 35:16-19 (King James).

[4] Robinson also did not testify at the hearing.

use the Bible as evidence in its deliberations.

Rodney Rodrigues corroborated the testimony of the previous two jurors that at least one juror read Biblical passages aloud to a small group of jurors at some point during the deliberations. He testified that he did not read the Bible, but that some of his fellow jurors did. He did not know which passages the other jurors read. Finally, Glenda Webb recalled seeing more than one Bible in the jury room, but she stated that the Bible was not a focus of the jury's discussions. She recalled that some jurors consulted the Bible after they had made their decision on the appropriate punishment.

Based on this evidence, the state court ruled that the jury did not act improperly. The court concluded that "a conscientious, dedicated and carrying [sic] jury considered this case in accord with the Court's Charge and the instructions of the Court and rendered their verdict in accord with the evidence they heard in this case uninfluenced by any outside influence of any kind shown to the Court in this hearing." Oliver appealed this ruling to the Texas Court of Criminal Appeals ("TCCA"), which affirmed the trial court's decision to deny a new trial and stated that Oliver had not "met his burden of showing outside influence. While there was testimony that at least one Bible was brought to the jury room and some passages were read by a few jurors, every juror who testified stated that neither the Court nor another juror claimed that the Bible should be considered as law or evidence in the case." The state trial court and the TCCA denied Oliver's state habeas petition.

After exhausting his state court remedies, Oliver sought a writ of habeas corpus from the district court. He argued that the jury improperly consulted the Bible during its deliberations, particularly given that at least one passage the jurors read specifically described the facts of his case. Oliver also presented newly discovered evidence regarding the jury's actions. He alleged that juror Michael Brenneisen, who did not testify at the state court hearing, told foreign journalist Egon Clausen in an interview that the jurors discussed the Bible in depth before they rendered their decision during the punishment phase of the trial.[5] Brenneisen told Clausen that he used the Bible during the punishment phase to ensure he was reaching the correct decision. Specifically, Brenneisen remembered asking himself, "is this the way the Lord would decide the case?" He also stated that the jury used the Bible "to lend support for or against the judgment call." He noted that the jury "went both directions in our use of the scripture—forgiveness and judgment." He acknowledged that the jury referred to specific passages in the Bible during its discussions, opening the Bible to various passages and reading them word-for-word. He also told Clausen that his personal belief is that if civil law and Biblical law conflict, then the Biblical law is paramount.[6]

---

[5] Oliver submitted to the district court a transcript of the interview between Clausen and Brenneisen. Clausen swore under oath in Denmark that the transcript was a true representation of his interview with Brenneisen.

[6] We present the information contained in Brenneisen's interview merely as background. As Oliver did not submit this

The district court denied Oliver's habeas ;ition. The court viewed his argument as a request an evidentiary hearing and ruled that Oliver is ; entitled to an additional hearing under 28 U.S.C. :254(e)(2). The court also construed Oliver's claim be a "pure question of fact" and denied habeas ief pursuant to the standard in § 2254(d)(2) that ; state court's decision was not "based on an reasonable determination of the facts in light of ; evidence presented in the state court)ceeding." The court, however, granted a tificate of appealability ("COA") on whether the ors' use of the Bible violated Oliver's Sixth or ghth Amendment rights.

On November 16, 2007, this court issued an inion denying Oliver's request for a COA on three related claims, denying his request for a stay and atement for a state or federal hearing, and questing that the parties file additional briefs on ; remaining claims.[7] *See Oliver v. Quarterman*, 4 F. App'x 381 (5th Cir. 2007) (per curiam) npublished). The only remaining question, erefore, involves the merits of Oliver's claim that ; jury improperly consulted the Bible when

---

dence to the state court and therefore did not "develop the tual basis of [his] claim in State court proceedings," we do consider the interview as substantive evidence in reaching decision. *See* 28 U.S.C. § 2254(e)(2); *Oliver*, 254 F. App'x at).

In that opinion, we indicated that we might set this case oral argument after the parties submitted their)plemental briefs. However, we conclude that we can decide s case without oral argument.

deliberating during the sentencing phase of his trial.

II. STANDARD OF REVIEW

Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a federal court cannot grant habeas relief unless the state court adjudication of that claim either

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d); *see Wiggins v. Smith*, 539 U.S. 510, 520 (2003). Under § 2254(d)(1), a decision is contrary to clearly established federal law if "the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law" or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [that precedent]." *(Terry) Williams v. Taylor*, 529 U.S. 362, 405 (2000). A decision involves an unreasonable application of Supreme Court precedent if it "unreasonably extends a legal principle from [Supreme Court precedent] to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 407. We must presume that the state court's factual findings are correct unless Oliver

meets his burden of rebutting that presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

III. DISCUSSION

A. Supreme Court Precedent

Oliver rests his argument on Supreme Court precedent that, under the Sixth Amendment, forbids a jury from being exposed to external influences during its deliberations.[8] *See Parker v. Gladden*, 385 U.S. 363, 364-65 (1966) (stating that "the evidence developed against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel" (internal quotation marks omitted)); *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) ("The requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury."); *Remmer v. United States*, 347 U.S. 227, 229 (1954) (stating that "private communication, contact, or tampering" with the jury is presumptively prejudicial); *Mattox v. United States*, 146 U.S. 140, 149 (1892) (stating that "in capital cases [ ] the jury should pass upon the case free from external causes tending to disturb the exercise of deliberated and unbiased judgment").

---

[8] Oliver makes virtually the same argument under the Eighth Amendment. However, as the applicable precedents invoke the Sixth Amendment, we constrain our analysis to that line of cases and reject his argument under the Eighth Amendment.

Remmer provides our starting point for determining the Supreme Court's clearly established law regarding external influences on a jury. *See* 347 U.S. at 229. *Remmer* involved a third party who attempted to bribe a juror. *Id.* at 228. The juror notified the judge, who then informed the prosecutors. *Id.* The judge asked the FBI to investigate the incident, and the FBI concluded that the third party had made the statement to the juror in jest. *Id.* As a result, neither the judge nor the prosecutor told the defendant about the incident. *Id.* The jury found the defendant guilty, and he appealed after learning of the alleged bribery attempt. *Id.* The Supreme Court vacated the lower court's judgment that the defendant had not shown any prejudice and held that in a criminal case,

> any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Id. at 229. *Remmer* thus prohibits jurors from being subjected to "private communication, contact, or

tampering" and considers any such external influences presumptively prejudicial. *Id.*; *cf. United States v. Sylvester*, 143 F.3d 923, 933 (5th Cir. 1998) (suggesting that "the presumption of prejudice and the assignment of the burden of proof are not triggered automatically but are imposed at the discretion of the district court").

Turner also involved an improper external influence on a jury. 379 U.S. at 467. There, two deputy sheriffs oversaw the sequestered jury. *Id.* As part of their duties, the deputies "ate with them, conversed with them, and did errands for them," although there was no evidence that the deputies spoke with the jurors about the case itself. *Id.* at 468. These same deputies also served as the prosecution's principal witnesses. *Id.* The Court held that the deputies' external contact with the jurors "subvert[ed] the[ ] basic guarantees of trial by jury." *Id.* at 473. In particular, the Court stated that "[t]he requirement that a jury's verdict must be based upon the evidence developed at the trial goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury." *Id.* at 472 (internal quotation marks omitted).

In *Parker*, a court bailiff assigned to shepherd the sequestered jury stated to one of the jurors, while the jury was on a public sidewalk, "Oh that wicked fellow [petitioner], he is guilty." 385 U.S. at 363. On another occasion, the bailiff remarked to at least one juror, "If there is anything wrong [in finding petitioner guilty] the Supreme Court will correct it." *Id.* at 364. The Supreme Court deemed the bailiff's statements to be "private talk, tending to

reach the jury by outside influence." *Id.* (internal quotation marks omitted). In a later decision describing *Parker*, the Court characterized the bailiff's statements as involving an improper "external influence." *See Tanner v. United States*, 483 U.S. 107, 117 (1987).

Finally, the Court fleshed out the difference between an "external" and an "internal" influence on a jury in *Tanner*. *Id.* at 117. There, the Court considered allegations that a juror was intoxicated during the trial. *Id.* at 110. The Court held that the Sixth Amendment did not require the district court to hold an evidentiary hearing, because juror intoxication is not an "external influence." *Id.* at 127. In so holding, the Court noted that lower courts have distinguished between external influences, which a defendant can use to impeach a jury's verdict, and internal influences, which are not presumptively prejudicial. *Id.* at 117-18. A juror is exposed to an external influence when the juror reads information not admitted into evidence, such as a newspaper article about the case, or hears prejudicial statements from others, as in *Parker* and *Remmer*. *Id.* at 117. In contrast, internal influences, which provide no basis for relief, include allegations of physical or mental incompetence of a juror, such as claims that a juror was insane, could not sufficiently understand English, or had a severe hearing impairment. *Id.* at 119.

These cases demonstrate that the Supreme Court has clearly established a constitutional rule forbidding a jury from being exposed to an external influence. Whether an influence is "external" or

"internal" depends on the facts of each case, but at its core the distinction amounts to an examination of the "nature of the allegation" of an improper influence on the jury. *Tanner*, 483 U.S. at 117; *see Robinson v. Polk*, 438 F.3d 350, 363 (4th Cir. 2006) ("Under clearly established Supreme Court case law, an influence is not an internal one if it (1) is extraneous prejudicial information; *i.e.*, information that was not admitted into evidence but nevertheless bears on a fact at issue in the case, or (2) is an outside influence upon the partiality of the jury, such as 'private communication, contact, or tampering with a juror.'") (internal citations omitted); *Robinson*, 438 F.3d at 373 (King, J., dissenting in part) ("If the 'nature' of the influence is that it *impairs* the juror's physical or mental ability to function effectively, it is an internal influence. Internal influences thus stand in stark contrast to their external counterparts, which come from without and carry the potential to *bias* the juror against the defendant."). Judge King, in his dissent from the denial of en banc rehearing in *Robinson*, cogently synthesized these Supreme Court cases:

> The external influences recognized by the Court in those decisions are factually diverse, but they share a single, constitutionally significant characteristic: they are external to the evidence and law in the case, and carry the potential to bias the jury against the defendant. This legal principle unifies the bailiff's remarks disparaging the defendant in *Parker*, the relationship of confidence between the jury

> and key prosecution witnesses in *Turner*, and the effort to bribe a juror in *Remmer*.

Robinson v. Polk, 444 F.3d 225, 231 (4th Cir. 2006) (King, J., dissenting). It is against this backdrop that we must consider whether the jurors' consultation of the Bible amounted to an external influence that raises a presumption of prejudice.

B. The Bible as an External Influence on the Jury

Stemming from these clearly established Supreme Court precedents, it is clear that the prohibition of external influences from *Remmer*, *Turner*, and *Parker* applies to this factual scenario. *See (Terry) Williams*, 529 U.S. at 407 (stating that a decision involves an unreasonable application of Supreme Court precedent if it "unreasonably refuses to extend [a legal principle from Supreme Court precedent] to a new context where it should apply"). Although there are no Fifth Circuit cases directly on point, language from the Eleventh, First, and Sixth Circuits bolsters this conclusion.

In *McNair v. Campbell*, 416 F.3d 1291, 1307-08 (11th Cir. 2005), the Eleventh Circuit analyzed a similar situation under the *Remmer* line of cases and determined that the jury's use of the Bible was presumptively prejudicial, but that the state had rebutted the presumption.[9] During the punishment phase of the trial, the foreman, a Christian minister, brought a Bible into the jury room during

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[9] The court held that the district court should have dismissed this argument as procedurally barred, but the court still went on to consider the merits of the claim. *McNair*, 416 F.3d at 1307.

deliberations, read aloud from it, and led the other jurors in prayer. *Id.* at 1301. The court noted that "[b]ecause it is undisputed that jurors in the guilt phase of McNair's trial considered extrinsic evidence during their deliberations, our analysis focuses on whether the State can rebut the resulting presumption of prejudice." The court held that the state had rebutted the presumption of prejudice because there was no evidence that the "innocuous" Bible passages in question had the effect of influencing the jury's decision. *Id.*

Even before this decision, a district court within the Eleventh Circuit undertook a similar approach to this question. In *Jones v. Kemp*, 706 F. Supp. 1534, 1558 (N.D. Ga. 1989), a juror asked the court if he could take a Bible into the jury room, and the court said yes. The district court, on habeas review, stated that "[a] situation in which a jury, unsupervised by the court and unobserved by counsel, could reach a conclusion by consulting sources other than the legal charge of the court and evidence actually received by the court is not permitted." *Id.* at 1560. The court distinguished the situation of jurors bringing their own Bibles into the jury room to consult for personal inspiration or spiritual guidance. *Id.* "The sole issue here involves the at least implied court approval of a group jury reference to an extra-judicial authority—here the Christian Bible—for guidance in deciding the explicit, statutorily mandated, carefully worded guidelines which must be followed by a jury deliberating during the sentencing phase of a death penalty case." *Id.* The court did not analyze whether the state could rebut the presumption of

prejudice.

The First Circuit also suggested that the presence of a Bible in the jury room amounts to an external influence on the jury's deliberations and that the Bible is no different from any other type of external influence that enters the jury's conscience. *See United States v. Lara-Ramirez*, 519 F.3d 76, 88 (1st Cir. 2008). That case does not directly align with the facts here, as it involved the direct review of a district court's mistrial declaration without the defendant's consent after the judge learned that the jury had consulted the Bible. *Id.* at 79. Nevertheless, the court's language is telling: the court stated that the district court erred in "treat[ing] the Bible in the jury room as qualitatively different from other types of extraneous materials or information that may taint a jury's deliberations." *Id.* at 88. The court held that "[b]ecause no special rule exists when the Bible is involved, the district court had a duty to investigate the colorable claim of juror taint in this case and explore and exhaust the alternatives to mistrial, just as it would in other situations where extraneous materials have been brought into the jury's deliberations." *Id.* at 89 (internal quotation marks omitted). Thus, underlying the court's analysis was the conclusion that the jurors' use of a Bible in the jury room constituted an "external influence."

The Sixth Circuit implied, albeit in dicta, that the presence of a Bible in the jury room is an external influence that might prejudice the jury's deliberations. *See Coe v. Bell*, 161 F.3d 320, 351 (6th Cir. 1998) (rejecting the petitioner's claim that the

prosecutor's closing argument mentioning the Bible amounted to reversible error). The court distinguished the situation of a prosecutor invoking the Bible during his closing argument from the cases where the jury actually had a Bible in the jury room. *Id.* The court concluded that "there is error in [the cases involving a Bible in the jury room] not because the book was the Bible, but because the book was not properly admitted evidence." *Id.*[10]

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[10] In addition to the Eleventh, First, and Sixth Circuits, three state supreme courts have held that a Bible in the jury room is an external influence on the jury's deliberations. In *People v. Harlan*, 109 P.3d 616, 629 (Colo. 2005), the Colorado Supreme Court held that the jury's consultation of written Biblical materials in the jury room was improper under state law. In *People v. Danks*, 82 P.3d 1249, 1275 (Cal. 2004), the court found that a juror's action in bringing Bible passages into the jury room was "misconduct," but that the nature of the particular Bible verses the jurors had read made this misconduct not prejudicial. Finally, in *State v. Harrington*, 627 S.W.2d 345, 350 (Tenn. 1981), the Tennessee Supreme Court found a constitutional error when "the jury foreman buttressed his argument for imposition of the death penalty by reading to the jury selected Biblical passages." Because the court reversed and remanded for a new sentencing hearing on a different ground, however, the court did not undertake any analysis regarding prejudice. *Id.*

Moreover, in a case involving slightly different facts, the Pennsylvania Supreme Court vacated a death sentence when the prosecutor told the jury during closing arguments, "As the Bible says, 'and the murderer shall be put to death.'" *Commonwealth v. Chambers*, 599 A.2d 630, 644 (Pa. 1991). There, the prosecutor did not invoke well-known Biblical aphorisms reminding jurors to follow the law but instead sought to "interject[ ] religious law as an additional factor for the jury's consideration which neither flows from the evidence

The Ninth Circuit, sitting en banc, refused to determine one way or the other whether the jury's reliance on the Bible constituted an external influence. *Fields v. Brown*, 503 F.3d 755, 781-82 (9th Cir. 2007) (en banc). In that case, a juror made notes "for" and "against" the death penalty based on his review of the Bible at home and then brought those notes into the jury room. *Id.* at 777-78. The court held, "[W]e do not need to decide whether there was juror misconduct because even assuming there was, we are persuaded that [the juror's notes] had no substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 781.

The only circuit to hold that the Bible is not an external influence is the Fourth Circuit.[11] In *Robinson v. Polk*, 438 F.3d 350 (4th Cir. 2006), a juror asked the bailiff for a Bible and then read several passages out loud in the jury room—including at least one referring to "an eye for an eye"—to convince the other jurors to vote for a death sentence. *Id.* at 357-58. The court ruled that "reading the Bible is analogous to the situation where a juror quotes the Bible from memory, which assuredly would not be considered an improper influence." *Id.* at 364. "*[P]recisely because* the Bible occupies a unique place in the moral lives of those who believe

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or any legitimate inference to be drawn therefrom." *Id.*; *see also Romine v. Head*, 253 F.3d 1349, 1368 (11th Cir. 2001) ("[A] prosecutor misleads a capital sentencing jury when he quotes scripture as higher authority for the proposition that death should be mandatory for anyone who murders his parents.").

[11] The Second, Third, Seventh, Eighth, Tenth, and D.C. Circuits have not spoken on this issue.

in it, its teachings cannot blithely be lumped together with a private communication, contact, or tampering with a juror without clear guidance from the Supreme Court."[12] *Id.* at 366; *see also Lenz v.*

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[12] The Fourth Circuit declined to rehear the case en banc, although Judge Wilkinson stated that he believed there should be a "clear line" distinguishing between "personal and deliberative use of the Biblical text" in the jury room. *Robinson v. Polk*, 444 F.3d 225, 226 (4th Cir. 2006) (Wilkinson, J., concurring in the denial of rehearing en banc). Judge Wilkinson voted to deny rehearing, however, because he believed that AEDPA constrained the circuit court from fashioning such a rule. *Id.* at 229. We do not share Judge Wilkinson's concerns in this case because we are not creating a new rule. *Remmer*, *Turner*, and *Parker* clearly establish that it is presumptively prejudicial for a jury to consult an external influence, and bringing the Bible into the jury room and reading specific passages that bear directly upon the facts of the case is plainly outside the evidence and law. *See, e.g.*, *Fields v. Brown*, 503 F.3d 755, 778-79 (9th Cir. 2007) (en banc) (stating that the prohibition from *Teague v. Lane*, 489 U.S. 288 (1989), of creating a "new rule" on habeas review does not preclude an argument that the Bible is an external influence). Further, we are not the first court to recognize the clearly established rule against external influences in the jury room and apply it to a set of facts that are distinct from those that the Supreme Court encountered. *See, e.g.*, *Wisehart v. Davis*, 408 F.3d 321, 327 (7th Cir. 2005) (deeming a juror's knowledge from outside sources that the defendant had taken a polygraph test during the trial to be an external influence); *Nevers v. Killinger*, 169 F.3d 352, 369 (6th Cir. 1999) (stating, in a case involving white police officers who beat a black suspect, that the jury's viewing of the movie Malcolm X, its learning that the city was preparing for a potential riot in the event of an acquittal, and its knowledge that the defendants had been members of a controversial undercover police unit was extraneous evidence); *United States v. Martinez*, 14 F.3d 543, 551 (11th Cir. 1994) (examining the jury's use of a dictionary during deliberations under *Remmer*).

Washington, 444 F.3d 295, 310-12 (4th Cir. 2006) (following *Robinson*); *Billings v. Polk*, 441 F.3d 238, 248 (4th Cir. 2006) (holding that a juror's reading of the Bible at home to assist his decision process did not raise a presumption of prejudice); *Burch v. Corcoran*, 273 F.3d 577, 591 (4th Cir. 2001) (stating that the jury's consultation of a Bible was not "improper jury communication" because the "Bible quotes, whether stated from memory or read from the book, were . . . statements of folk wisdom or of cultural precepts"). Judge King wrote a vigorous dissent in *Robinson*, which, given the Supreme Court's clear guidance regarding external influences and the analysis from the rest of the circuits, we find more persuasive than the majority's opinion. *See Robinson*, 438 F.3d at 368 (King, J., dissenting in part). Further, although we part company with the Fourth Circuit and join the majority of other courts to pass upon this issue, we note that the Fourth Circuit's cases are distinguishable in that they all involved a juror reading general Biblical statements, as opposed to a command that directly tracked the specific facts of those cases.

This analysis persuades us that when a juror brings a Bible into the deliberations and points out to her fellow jurors specific passages that describe the very facts at issue in the case, the juror has crossed an important line. The Supreme Court counsels us that a jury may not consult material that is outside the law and evidence in the case. The

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But see United States v. Williams-Davis, 90 F.3d 490, 503 (D.C. Cir. 1996) (holding that a juror's use of a dictionary did not raise a presumption of prejudice).

Bible passages in question here were not part of the law and evidence that the jury was to consider in its deliberations. Moreover, the jurors did not simply discuss their own understanding of religious law and morality or quote Bible passages from memory to aid the discussion. Instead, the jurors referenced a specific passage that stated that someone who engages in a particular act—striking a person with an object and killing him, as Oliver did to Collins—is a murderer and must be put to death. Most circuits have ruled that when a Bible itself enters the jury room, the jury has been exposed to an external influence. Here, we face facts that are even more egregious than in those previous cases, as the jurors consulted a specific passage that provided guidance on the appropriate punishment for this particular method of murder. As such, we hold that the jury's consultation of the Bible passages in question during the sentencing phase of the trial amounted to an external influence on the jury's deliberations.

The question before us is not whether a juror must leave his or her moral values at the door or even whether a juror may consult the Bible for his or her own personal inspiration during the deliberation process. This case is also not about whether jurors must forget that, generally, the Bible includes the concept of an "eye for an eye." *See Burch*, 273 F.3d at 591 (noting that the "Bible quotes, whether stated from memory or read from the book, were . . . statements of folk wisdom or of cultural precepts"). Therefore, we need not address these issues. Instead, here, several jurors collectively consulted a Bible, in the jury room, and likely compared the facts

of this case to the passage that teaches that capital punishment is appropriate for a person who strikes another over the head with an object and causes the person's death.

The state urges us to consider solely whether the Bible passage at issue had any bearing on the factual questions the jury had to decide during the sentencing phase: whether Oliver presented a threat of future dangerousness and whether there was mitigating evidence to warrant a sentence of life imprisonment instead of death. This argument misses the mark. The Bible served as an external influence precisely because it may have influenced the jurors simply to answer the questions in a manner that would ensure a sentence of death instead of conducting a thorough inquiry into these factual areas. Further, the Bible passage in this instance was evidence of the "circumstances of the offense that militates for . . . the imposition of the death penalty." TEX. CODE CRIM. PROC. ANN. art. 37.071(d)(1) (discussing the instructions the court must give to the jury in a death penalty case).

A contrary holding would eviscerate the rule from *Remmer* that jurors must rely on only the evidence and law presented in an open court room. It may be true that the Bible informs jurors' general outlook of the world and their moral values in particular, and jurors may constitutionally rely upon those morals in their deliberations. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 149 (1994) (O'Connor, J., concurring) ("Jurors are not expected to come into the jury box and leave behind all that their human experience has taught them." (internal

citation and quotation marks omitted)). But the particular passage at issue here does not generally inform a juror's moral understanding of the world. The jurors did not testify that they knew, as people of faith, that someone who hits another over the head with an "instrument of iron" or a "hand weapon of wood" so that the person dies is a murderer and should be put to death. Instead, several jurors testified that they read this passage in the Bible while they were in the jury room debating Oliver's fate. Thus, the jury's use of the Bible here amounts to a type of "private communication, contact, or tampering" that is outside the evidence and law, which is exactly what *Remmer* sought to circumscribe. 347 U.S. at 229.

C. Harmless Error Analysis

Our inquiry, however, is not complete. We must next determine the effect the Bible had on the jury's decision to impose the death penalty. That is, given that there was a constitutional error because the jury consulted an external influence, we must determine if that constitutional error was harmless. *See Garcia v. Quarterman*, 454 F.3d 441, 444 (5th Cir. 2006) ("If the issue is a mixed question of law and fact, such as the assessment of harmless error, we review the district court's determination de novo.").

Normally, under *Remmer*, if prejudice is likely from the jury's consultation of an external influence, the court may place the burden of rebutting that presumption on the state. *See Remmer*, 347 U.S. at 229; *United States v. Sylvester*, 143 F.3d 923, 934 (5th Cir. 1998) (stating that "only when the court

determines that prejudice is likely should the government be required to prove its absence"); *see also United States v. Olano*, 507 U.S. 725, 739 (1993) (stating that the ultimate inquiry is whether "the intrusion affect[ed] the jury's deliberations and thereby its verdict"). However, on habeas review, we do not use the normal harmless error analysis. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993); *Pyles v. Johnson*, 136 F.3d 986, 994 (5th Cir. 1998). Instead, habeas petitioners are not entitled to relief based on a constitutional error unless the error "had [a] substantial and injurious effect of influence in determining the jury's verdict." *Id.* (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)); *see also Fry v. Pliler*, 127 S. Ct. 2321, 2328 (2007) (holding that a federal court must assess the prejudicial impact of a constitutional error in a state court criminal trial under the "substantial and injurious effect" standard set forth in *Brecht*).[13]

Other courts to consider the effect of a Bible in the jury room have not faced similar facts, where the passage the jury read described the defendant's

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[13] Not all circuits are in agreement regarding the appropriate standard for determining prejudice when a jury improperly consults the Bible during deliberations. In *McNair v. Campbell*, the Eleventh Circuit did not cite *Brecht* and instead analyzed whether the state could rebut the resumption of prejudice, holding that the state had carried its burden based on the "innocuous nature" of the Bible passages in question. 416 F.3d 1291, 1309 (11th Cir. 2005). However, we must follow our previous decision in *Pyles*, which stated that the Supreme Court requires us to use the *Brecht* standard when evaluating a habeas petitioner's claim that a juror improperly considered external evidence. *See Pyles*, 136 F.3d at 992.

method of killing. For example, in *McNair v. Campbell*, the Eleventh Circuit noted that the two passages that the foreman had read to the jury did not contain "material which would encourage jurors to find a defendant guilty or to recommend the death penalty."[14] 416 F.3d at 1308 (internal quotation marks omitted). Therefore, the Bible passages "merely had the effect of encouraging the jurors to take their obligations seriously and to decide the question of guilt or innocence based only on the evidence." *Id.* at 1309 (internal quotation marks omitted). In addition to the innocuous nature of the Bible passages at issue, the court noted that a juror brought in the extraneous evidence without the imprimatur of the court and that the state's case against the defendant was particularly strong. *Id.* These factors supported the court's view that the Bible passages did not prejudice the jury's decision. *Id.*[15]

Similarly, the Ninth Circuit, sitting en banc, rejected the petitioner's argument of prejudice when a juror made notes "for" and "against" the death penalty based on his review of the Bible at home and

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[14] "The two Bible verses read included the familiar Psalm 121, and Luke 6:37. The latter verse reads as follows: 'Judge not, and ye shall not be judged; condemn not and ye shall not be condemned; forgive, and ye shall be forgiven . . . .'" *McNair*, 416 F.3d at 1308 n.16.

[15] The court also noted that the habeas petitioner had not rebutted the state court's factual finding that the Bible did not prejudice the jury's decision. *Id.* at 1308-09. Nevertheless, the court undertook its own review of the record and determined that the state had "carried its burden of rebutting the presumption of prejudice." *Id.* at 1309.

then brought those notes into the jury room. *Fields v. Brown*, 503 F.3d 755, 776-82 (9th Cir. 2007) (en banc). The court chose not to decide whether the juror's conduct was improper because, either way, the notes did not have a "substantial and injurious effect or influence in determining the jury's verdict."[16] *Id.* at 781. The court rested its decision of no prejudice on the fact that the juror's notes had both a "for" and "against" part, the notes entered the jury room early in the deliberations and thus jurors could still take as much time as they needed to sort through the evidence and reflect on the appropriate punishment, the jury was instructed to base its decision solely on the facts and the law as presented during the trial, and the aggravating evidence was powerful given that the case involved multiple murders, rape, and kidnapping. *Id.* at 781-82.[17]

While the facts before us regarding the jury's use of the Bible are perhaps more egregious than in

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[16] Thus, the Ninth Circuit's approach was backwards under *Remmer*: the court found that any use of the Bible was not prejudicial before determining if the Bible was an external influence that would trigger the presumption of prejudice.

[17] Six judges dissented. As Judge Gould noted, "Considering that if only one juror had declined to sentence Fields to death the trial court would have been obligated to impose a life sentence, it is more probable than not that [the juror's] introduction of written researched Bible quotations into jury deliberations" prejudiced the jury. *Id.* at 788 (Gould, J., dissenting). Judge Berzon added that "[h]ere, there is no question that the Biblical passages copied by [the juror] pertained to the key legal question before the jury at the penalty phase—whether death was the appropriate sentence for Fields's acts." *Id.* at 793 (Berzon, J., dissenting).

these previous cases, the procedural posture here constrains our analysis. This is because here, the state court made a factual finding regarding the effect of the Bible on the jury, and we must defer to that factual finding unless Oliver presents "clear and convincing" evidence to the contrary. *See* 28 U.S.C. § 2254(e)(1). After hearing the testimony of four jurors at an evidentiary hearing on Oliver's motion for a new trial, the state court ruled that the jurors rendered their decision "in accord with the evidence they heard in this case uninfluenced by any outside influence of any kind shown to the Court in this hearing." In essence, the state court made a finding that the Bible did not prejudice the jury's decision. The effect of an ex parte communication on a juror's impartiality is a question of "historical fact." *Rushen v. Spain*, 464 U.S. 114, 120 (1983) (per curiam) (deferring to state court's finding of "historical fact" that the ex parte communications between a judge and a juror did not bias the jury's decision); *see also Patton v. Yount*, 467 U.S. 1025, 1036-37 (1984) (holding that the question of juror impartiality is not a mixed question of law and fact but instead is "plainly one of historical fact"). A state court's post-trial factual finding regarding a juror's impartiality is entitled to a "presumption of correctness." *Rushen*, 464 U.S. at 120.

For example, in *Moody v. Johnson*, the state court conducted two evidentiary hearings and determined that the improper conversation between the bailiff and one of the jurors did not impact the jury's deliberations. 139 F.3d 477, 483 (5th Cir. 1998). On habeas review, we noted that "[t]he

determination of whether there was any improper conduct and its [e]ffect, if any, on juror impartiality are questions of historical fact that 'must be determined, in the first instance, by state courts and deferred to, in the absence of 'convincing evidence' to the contrary, by the federal courts.'" *Id.* (citing *Rushen*, 464 U.S. at 120); *see, e.g.*, *Schaff v. Snyder*, 190 F.3d 513, 534-35 (7th Cir. 1999) (deferring to state court's post-trial factual finding that the extraneous statement the jury had heard regarding other similar charges against the defendant did not bias the jury's decision); *Crease v. McKune*, 189 F.3d 1188, 1193 (10th Cir. 1999) (deferring to state court's factual finding that improper communication between the judge and a juror did not prejudice the habeas petitioner). In contrast, if the state court does not make factual findings regarding the effect of an external influence on the jury, then we simply conduct a harmless error analysis using the *Brecht* standard without having to defer to any state court findings. *See, e.g.*, *Pyles*, 136 F.3d at 994-95 (analyzing the prejudicial effect of a juror improperly visiting the crime scene without mentioning whether the state court made any factual findings). *But see Dorsey v. Quarterman*, 494 F.3d 527, 531 (5th Cir. 2007) (conducting a harmless error analysis without explicitly deferring to the state court's conclusion that the jury could continue deliberating even though two jurors had viewed evidence not in the record).

Oliver has failed to demonstrate that the state court's finding that the Bible did not influence the jury lacks "even fair support in the record." *Rushen*,

464 U.S. at 120 (internal quotation marks omitted). Although the record includes evidence that cuts both ways, given the highly deferential standard of habeas review, we conclude that at least four factors provide "fair support in the record" for the state court's finding. *See id.*; *see also Nelson v. Quarterman*, 472 F.3d 287, 310 (5th Cir. 2006) (en banc) ("We are mindful that under AEDPA a federal court may not grant habeas relief simply because it disagrees with the state court's resolution of an issue . . . ."). First, there is contradictory evidence regarding whether the jurors' consultation of the Bible occurred before or after the jury reached its decision. Second, several jurors testified that the Bible was not a focus of their discussions. Third, the court instructed the jury that "[i]n deliberating upon the cause you are not to refer to or discuss any matter or issue not in evidence before you" and that "you are bound to receive the law from the Court."[18] Fourth, the jurors brought the Bibles into the jury room by themselves and without the imprimatur of the court. While Oliver makes several arguments that the Bible passages might have swayed the jury, he has not presented clear and convincing evidence

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[18] We note that this factor also cuts against the state's argument in that the jurors disobeyed the court's instructions by consulting the Bible, which potentially tainted the jury's decision. *See Fields*, 503 F.3d at 787 (Gould, J., concurring in part and dissenting in part) (noting that "here the conclusion is inescapable that the jury did not follow the trial court's instructions" when it consulted the Bible). This fact also calls into question the court's statement that the jurors "considered this case in accord with the Court's Charge and the instructions of the Court . . . ."

to rebut the presumption of correctness that we must afford to the state court's factual finding, particularly given that the state court heard from the jurors themselves and concluded that the Bible did not prejudice their decision. *See Rushen*, 464 U.S. at 120 ("This finding of 'fact'—on a question the state courts were in a far better position than the federal courts to answer—deserves a high measure of deference . . . ." (internal quotation marks and citation omitted)); *Young v. Herring*, 938 F.2d 543, 559 n.8 (5th Cir. 1991) (noting that the trial judge is "uniquely qualified to appraise the prejudicial effect of a communication on the jury"). As Oliver has not presented clear and convincing evidence to rebut the state court's finding that the Bible did not influence the jury's decision, we cannot say that the jury's use of the Bible had a "substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 637.

IV. CONCLUSION

The jury's use of the Bible during the sentencing phase of Oliver's trial amounted to an improper external influence on the jury's deliberations. However, Oliver has failed to rebut the state court's factual finding that the Bible did not prejudice the jury's decision. Therefore, we AFFIRM the district court's judgment denying habeas relief.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-70006

United States Court of Appeals
Fifth Circuit

FILED

November 16, 2007
Charles R. Fulbruge III
Clerk

KHRISTIAN OLIVER

Petitioner-Appellant

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Texas, Beaumont Division
No. 1:04-cv-00041-RHC

Before SMITH, GARZA, and PRADO, Circuit Judges.

PER CURIAM:*

Khristian Oliver ("Oliver") seeks habeas corpus relief from his conviction and sentence of death for the murder of Joe Collins ("Collins"). After denying habeas relief on all claims, the district court granted Oliver a certificate of appealability ("COA") on two issues: (1) whether he suffered a denial of his right to an impartial jury under the Sixth Amendment when jurors consulted Biblical scripture that called for death as the punishment for murder, and (2) whether Oliver suffered a denial of his right to a punishment determination based upon discretion carefully guided by law under the Eighth Amendment because several jurors consulted the Bible during deliberations. Oliver appeals the denial of a COA for three of his claims and the denial of habeas relief for the claims in which he received a COA. He also seeks either a stay and abatement of the federal proceeding so that he may go back to state court for an evidentiary hearing or a federal evidentiary hearing regarding his Bible-related claims. After reviewing the record, we DENY Oliver's request for a COA on his three additional claims. We also DENY Oliver's request for a stay and abatement for a state hearing and his request for a federal evidentiary hearing on his Bible related

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

claims. Finally, we set this case for oral argument regarding the remaining claims and direct the parties to focus on specific issues, as discussed below.

I. FACTUAL AND PROCEDURAL BACKGROUND

The district court recounted the facts as follows:

> Oliver began a crime spree about a year and [a] half before the incident which resulted in his conviction in this case. There were over a dozen burglaries and many of them involved the use of weapons. On March 17, 1998, Oliver, his girlfriend Sonya Reed, Bennie Rubalcaba (age 16) and his brother, Lonny Rubalcaba (age 15), stopped at the house of the victim, Joe Collins, in rural Nacogdoches County. Oliver and Lonny Rubalcaba went to burglarize the house, carrying Oliver's .380 caliber pistol, a handful of bullets and bolt cutters. Reed and Bennie Rubalcaba stayed in the truck. While the two were in the house, Collins came home. Collins shot Lonny Rubalcaba in the leg as he and Oliver were trying to escape. Oliver then shot Collins five times. At least two of the shots were fired while the victim lay on his back on the ground outside his house. As Bennie Rubalcaba helped his brother Lonny back to the truck he turned and saw Oliver striking Collins several times in the head with a rifle butt, while Collins was lying on the ground. Collins's skull was severely fractured and his face was disfigured nearly beyond

recognition.

> Oliver then joined the group in the truck. The group took Lonny Rubalcaba to the hospital and went to the Sheriff's office and filed reports saying that someone had driven by and shot Lonny while they were all at a farm. The next day, deputies picked up Bennie Rubalcaba and questioned him. Bennie then gave a written statement admitting what had actually happened. The same morning, police questioned Lonny Rubalcaba, who, after originally repeating the story about the farm, gave a second written statement coinciding with his brother's second statement. Police located Oliver and Reed at a Houston motel and arrested them.

A jury convicted Oliver of capital murder based on his killing of Collins during the commission of a burglary. The Texas Court of Criminal Appeals ("TCCA") affirmed Oliver's conviction and sentence of death. Oliver v. State, No. 73,837, slip op. (Tex. Crim. App. April 17, 2002) (unpublished). The United States Supreme Court denied his petition for a writ of certiorari. *Oliver v. Texas*, 537 U.S. 1161 (2003). The TCCA denied Oliver's petition for post-conviction relief, and the United States Supreme Court again denied his petition for a writ of certiorari. *Oliver v. Texas*, 538 U.S. 1001 (2003). On January 21, 2004, Oliver filed an application for a writ of habeas corpus with the district court. The Appellee Nathaniel Quarterman (the "Director") moved for summary judgment on all of Oliver's

claims. The district court granted the Director's motions in two separate orders on September 29, 2005, and November 9, 2005. The court granted a COA for two issues but denied a COA for the remaining claims.

II. Analysis

A. Oliver's requests for a COA

1. Standard for issuing a COA

Because Oliver filed his habeas petition in the district court after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254, AEDPA governs his petition. *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997). Under AEDPA, Oliver must obtain a COA from either the district court or appellate court before he can appeal the denial of habeas relief. *See* 28 U.S.C. § 2253(c)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To obtain a COA, Oliver must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). That is, if Oliver can show that the district court's application of AEDPA to his constitutional claims is debatable among reasonable jurists, we will issue a COA. *Miller-El*, 537 U.S. at 336.

In deciding whether to grant a COA, we are limited "to a threshold inquiry into the underlying merit of [the petitioner's] claims." *Miller-El*, 537 U.S. at 327 (citing *Slack v. McDaniel*, 529 U.S. 473, 481 (2000)). Our analysis "requires an overview of the claims in the habeas petition and a general assessment of their merits" rather than a "full consideration of the factual or legal bases adduced in

support of the claims." *Id.* at 336. "Because the present case involves the death penalty, any doubts as to whether a COA should issue must be resolved in [the petitioner's] favor." *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000).

In deciding whether to grant a COA, we recognize that AEDPA imposes a deferential standard of review on a federal habeas court with respect to claims adjudicated on the merits in state court. A federal court cannot grant habeas relief unless the state court adjudication of that claim either:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d); *see Wiggins v. Smith*, 539 U.S. 510, 520 (2003). A decision is contrary to clearly established federal law if "the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law" or "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [that precedent]." *(Terry) Williams v. Taylor*, 529 U.S. 362, 405 (2000). A decision involves an unreasonable application of Supreme Court precedent if it "unreasonably extends a legal

principle from [Supreme Court precedent] to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 407. We presume the facts of the case to be correct unless Oliver meets his burden of rebutting that presumption by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

2. **Reasonable jurists would not debate that *Apprendi* is inapplicable to the mitigation special question**

Oliver argues that the trial court erred in failing to instruct the jury that the State had the burden of proof beyond a reasonable doubt on the issue of mitigation during the punishment phase of the trial. He contends that the Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Ring v. Arizona*, 536 U.S. 584 (2002), extend the requirement of proof beyond a reasonable doubt to a jury's determination of mitigating factors that would warrant a sentence of life imprisonment instead of death. In *Apprendi*, the Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Oliver contends that Texas's capital murder statute provides for life imprisonment as the maximum penalty, and that death is the penalty only if the jury answers both "special issues" questions in the proscribed way. Therefore, Oliver claims, Texas's statute violates *Apprendi* because it allows a jury to "increase" the maximum penalty to death without the State showing the absence of

mitigating factors beyond a reasonable doubt.

Texas law regarding the death penalty first requires a jury to find the defendant guilty of a capital felony. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 § 1 (Vernon 2006). If the state seeks the death penalty, then the trial court must conduct a second punishment proceeding. *Id.* § 2(a)(1). During deliberations on whether to impose the death penalty, the jury must answer two "special issues" questions: First, "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society," and second, "whether . . . there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed." *Id.* §§ 2(b)(1), (2)(e)(1). The court will impose the death penalty only if the jury unanimously answers the first question "yes" and the second question "no." *Id.* That is, the jury must find that there are aggravating factors and insufficient mitigating factors.

Reasonable jurists would not debate that *Apprendi* is inapplicable to the jury's determination of mitigating factors. In *Apprendi*, the Supreme Court specifically distinguished between "facts in aggravation of punishment and facts in mitigation," stating that burden-of-proof requirements are "absent" from a scheme that allows a judge to impose a sentence below the maximum penalty based on mitigating factors. *Apprendi*, 530 U.S. at 490 n.16 (noting that in reducing a sentence based on mitigating factors, a judge is "neither exposing the

defendant to a deprivation of liberty greater than that authorized by the verdict according to statute, nor is the judge imposing upon the defendant a greater stigma than that accompanying the jury verdict alone"); *see also Ring*, 536 U.S. at 597 n.4 (noting that its decision that a sentencing judge may not, sitting alone, determine the presence or absence of aggravating factors does not extend to the finding of mitigating circumstances); *Rowell v. Dretke*, 398 F.3d 370, 376-77 (5th Cir. 2005) (noting that *Ring* did not apply to the burden of proof for mitigating factors because the Court "focused exclusively on certain judicial findings regarding aggravating factors"). Similarly, in *Walton v. Arizona*, the Court stated that "[s]o long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." 497 U.S. 639, 650 (1990), *overruled on other grounds*, *Ring*, 536 U.S. at 584. More recently, the Supreme Court upheld Kansas's death penalty scheme that placed the burden of proving the existence of aggravating factors on the state but required the defendant to offer any mitigating evidence. *Kansas v. Marsh*, 126 S. Ct. 2516, 2524 (2006); *see id.* at 2527 ("Significantly, although the defendant appropriately bears the burden of proffering mitigating circumstances—a burden of production—he never bears the burden of demonstrating that mitigating circumstances outweigh aggravating circum-

stances."). Plainly, therefore, if a state's scheme is constitutional when it places the burden of production for mitigating factors on the defendant, then Texas's death penalty statute also comports with Supreme Court precedent because it leaves open who has the burden of proof for mitigating factors.

This court's cases also have upheld Texas's scheme of not instructing the jury on who has the burden of proof for mitigating factors. *See Granados v. Quarterman*, 455 F.3d 529, 537 (5th Cir.), *cert denied*, 127 S. Ct. 732 (2006). In *Granados*, the court granted a COA to a death penalty habeas applicant on this very same claim and subsequently rejected the applicant's argument after additional briefing. *Id.* In so doing, the court noted that death—not life imprisonment—is the maximum sentence for a capital conviction under Texas law. *Id.* "Put another way, a finding of mitigating circumstances reduces a sentence from death, rather than increasing it to death." *Id.* Similarly, this court noted that "[n]o Supreme Court or Circuit precedent constitutionally requires that Texas's mitigation special issue be assigned a burden of proof." *Rowell*, 398 F.3d at 378; *see also Ortiz v. Quarterman*, No. 06-70020, 2007 WL 2936244, at *10 (5th Cir. Oct. 10, 2007) (rejecting a COA for this exact same claim); *Scheanette v. Quarterman*, 482 F.3d 815, 828 (5th Cir. 2007) (same). Given the extensive Supreme Court and circuit precedent, reasonable jurists would not debate that *Apprendi* has no application to Texas's scheme of leaving open who has the burden of proof for the mitigation special issue. We

therefore DENY Oliver's request for a COA on this claim.

3. **Reasonable jurists would not debate that *Penry II* does not apply to the lack of jury instructions regarding mitigation**

Oliver contends that Texas's "special issues" questions—which place the burden of proof on the State to show aggravating but not mitigating factors—sends "mixed signals" to the jury in violation of *Penry v. Johnson* (*Penry II*), 532 U.S. 782, 802 (2001). Oliver argues that failing to assign a burden of proof for the mitigation factors produces a confusing effect and encourages jurors to evaluate the evidence in inconsistent ways.

In *Penry II*, the Supreme Court struck down a judicially crafted jury instruction because it was confusing and, in effect, required the jury to answer the special issues dishonestly in order to give effect to the defendant's mitigating evidence. *Id.* at 801. The Court rejected the instruction as sending "mixed signals" to the jury. *Id.* at 802. The Court, however, implicitly upheld Texas's current scheme:

> A clearly drafted catchall instruction on mitigating evidence also might have complied with [the Court's precedents]. Texas' current capital sentencing scheme (revised after Penry's second trial and sentencing) provides a helpful frame of reference. Texas now requires the jury to decide "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's

> character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." TEX. CODE CRIM. PROC. ANN. art. 37.071(2)(e)(1) (Vernon Supp. 2001). . . . At the very least, the brevity and clarity of this instruction highlight the confusing nature of the supplemental instruction actually given, and indicate that the trial court had adequate alternatives available to it as it drafted the instructions for Penry's trial.

Id. at 803. Far from rejecting the current scheme regarding mitigation, therefore, the Supreme Court implicitly endorsed it. *See, e.g., Coleman v. Quarterman*, 456 F.3d 537, 542 (5th Cir. 2006), *cert denied*, 127 S. Ct. 2030 (2007) (quoting *Rowell*, 398 F.3d at 378) ("[N]o Supreme Court or Circuit precedent constitutionally requires that Texas's mitigation special issue be assigned a burden of proof."). Oliver has failed to make any plausible argument that Texas's mitigation special issue does not allow the jury to consider and give effect to a defendant's mitigating evidence. Oliver also points to no other cases to support his position. Thus, Oliver has failed to explain why the district court's decision amounted to a violation of "clearly established federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). Reasonable jurists would not debate that the district court properly rejected Oliver's claim. We therefore DENY Oliver's request

for a COA on this claim.

4. Reasonable jurists would not debate that the district court did not err in rejecting Oliver's parole instruction claim

Oliver argues that the trial court's failure to instruct the jury that a life sentence would require Oliver to spend forty years in prison before becoming eligible for parole violated the Eighth Amendment's requirement of heightened reliability in the jury instructions. He rests his argument on an "evolving standard regarding parole instructions" that he claims mandated his requested jury charge. Specifically, he argues that during his trial, in April 1999, the Texas legislature considered, and then passed, a law requiring an instruction that notified the jury that the defendant would not be eligible for parole for forty years. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(e)(2)(B) (Vernon 1999).[1] This

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[1] The new instruction (now no longer in effect), for crimes committed after September 1, 1999, read:

> Under the law applicable in this case, if the defendant is sentenced to imprisonment in the institutional division of the Texas Department of Criminal Justice for life, the defendant will become eligible for release on parole, but not until the actual time served by the defendant equals 40 years, without consideration of any good conduct time. It cannot accurately be predicted how the parole laws might be applied to this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted.

law became effective for crimes committed on or after September 1, 1999. Act approved May 21, 1999, 76th Leg. R.S., ch. 140, § 2, 1999 Tex. Sess. Law. Serv. 140 (Vernon). Oliver correctly concedes that the amended statute does not apply retroactively to his trial and instead argues that the legislative hearing that culminated in the revised jury instruction represented an "evolving standard" that required the jury to know, even before the law took effect, of Oliver's ineligibility for parole for forty years.

In *Simmons v. South Carolina*, the Supreme Court ruled that a capital defendant has a constitutional right to inform the jury of his ineligibility for parole when the state's statute provides for a life sentence without the possibility of parole as the alternative to the death penalty. 512 U.S. 154, 168-69 (1994) (plurality opinion). The plurality specifically exempted from its decision those state statutes that provide for the possibility of parole. *Id.* at 168 ("In a State in which parole is available, how the jury's knowledge of parole availability will affect the decision whether or not to impose the death penalty is speculative, and we shall not lightly second-guess a decision whether or not to inform a jury of information regarding

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See TEX. CODE CRIM. ANN. art. 37.071 § 2(e)(2)(B) (Vernon 1999). Texas has since amended its statutes to provide for life without parole as the alternative to the death penalty and to instruct the jury of this fact. *See id.* § 2(e)(2)(B) (Vernon 2006) (The Court shall "charge the jury that a defendant sentenced to confinement for life without parole under this article is ineligible for release from the department on parole.").

parole."). In *Ramdass v. Angelone*, the Court reiterated that the *Simmons* rule applies only when the defendant is ineligible for parole for life under state law. 530 U.S. 156, 166-67 (2000) (plurality opinion) (holding that the trial judge did not have to provide a jury instruction on a life sentence under *Simmons* because the defendant was not actually parole ineligible at the time of his capital sentencing). Although the Supreme Court decided these cases under due process rationale and not the Eighth Amendment, we find them instructive as to the lack of an evolving standard requiring a jury instruction regarding a Texas statute that allowed for the possibility of parole.

Indeed, we have rejected similar claims from other habeas petitioners. *See Thacker v. Dretke*, 396 F.3d 607, 617 (5th Cir. 2005) ("Since *Simmons* was decided, we have repeatedly held that neither the Due Process clause nor the Eighth Amendment requires Texas to allow presentation of parole eligibility issues, because Texas does not offer, as an alternative to capital punishment, life imprisonment without possibility of parole.") (footnote omitted); *Rudd v. Johnson*, 256 F.3d 317, 320-21 (5th Cir. 2001) (rejecting a COA for this exact same claim); *Johnson v. Scott*, 68 F.3d 106, 112 (5th Cir. 1995) ("We have consistently held . . . that neither the due process clause nor the Eighth Amendment compels instructions on parole in Texas.").

Given this precedent,[2] reasonable jurists would

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[2] The only case that Oliver cites to support his position is *Clark v. Tansy*, 882 P.2d 527, 533 (N.M. 1994), where the New

not debate that there is no "evolving standard" that required the trial court to provide Oliver's requested jury instruction. *See Thacker*, 396 F.3d at 617 ("Thus, settled precedent makes pellucid the reasonableness of the state court's rejection of [the habeas petitioner's] argument that *Simmons* and its progeny require that he be able to raise parole eligibility with the jury. The district court's denial of his claims, therefore, is not reasonably debatable and cannot justify the issuance of a COA."). We therefore DENY Oliver's request for a COA on this claim.[3]

B. Oliver's claims for which he received a COA

The district court rejected Oliver's request for

Mexico Supreme Court held that due process required a jury instruction that notified the jury as to the length of incarceration the defendant would face before becoming eligible for parole if he is not sentenced to death. *Clark* provides little support, however, because the court explicitly chose not to decide the case on Eighth Amendment grounds. *Id.* at 490. Moreover, even if *Clark* supports Oliver's position, it is hardly enough evidence to constitute an "evolving standard."

[3] We also note that Oliver's requested jury instruction would amount to a "new rule" in violation of the non-retroactivity principle of *Teague v. Lane*, 489 U.S. 288, 310 (1989). *See Thacker*, 396 F.3d at 617 n.15 ("Although [the habeas petitioner] argues at length that applying *Simmons* in the way he proposes would merely be an unremarkable application of existing precedent, this is plainly not the case. Given the volume of caselaw in this circuit holding that, despite *Simmons*, the Fourteenth and Eighth Amendments do not require Texas to allow discussion of parole eligibility in capital trials, a decision to the contrary here would undoubtedly constitute a 'new rule' under *Teague* and is therefore barred.").

habeas relief but granted a COA on two claims related to several jurors' alleged use of the Bible during jury deliberations. Oliver contends that evidence from his state court post-conviction hearing on his motion for a new trial, as well as additional evidence uncovered after that hearing, demonstrates that jurors consulted the Bible when considering whether to impose death or life imprisonment during the punishment phase of his trial. Oliver argues that any use of the Bible during jury deliberations violated his rights under the Sixth and Eighth Amendments. Oliver also asks this court either to stay this proceeding so that the state court can conduct an additional hearing based on the newly-discovered evidence or remand to the federal district court for an evidentiary hearing.

1. **Oliver's request for a stay and abatement or for an evidentiary hearing is without merit**

Oliver argues that he is entitled to, and never received, a hearing on the additional evidence he uncovered from an interview between a foreign journalist and juror Michael Brenneisen (the "Brenneisen interview"). This interview took place in February 2002, one month after Oliver had timely submitted his habeas application to the TCCA. In the interview, Brenneisen stated that jurors relied on the Bible in making their decision during the punishment phase of deliberations.[4] Upon learning of the interview, Oliver submitted to the TCCA an

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[4] Oliver claims that Brenneisen's interview confirms and bolsters the evidence from the four jurors who testified during the state post-conviction hearing.

"Objection[ ] to Disposition Without Evidentiary Hearing and Motion for Extension of Time to File Habeas Findings of Fact and Conclusions of Law." The TCCA deemed this motion to be a subsequent application for habeas corpus because Oliver submitted it after the state law deadline for an initial writ of habeas corpus. The court therefore dismissed the subsequent application as an abuse of the writ.

Oliver then filed his federal habeas application in the district court. The court denied his motion to stay the federal proceeding so that he could seek a hearing in state court based on his "new" evidence. The court determined that "the appropriate relief [when a habeas applicant asserts that he has not exhausted his claim in the state court based on newly discovered evidence] . . . is for the federal court to consider the new evidence, not to remand the case to the state court."[5] Oliver submitted a transcript of the interview to the district court. The court denied Oliver's request for a federal hearing on this issue. In particular, the court ruled that under 28 U.S.C. § 2254(e)(2), Oliver was not entitled to a hearing because he did not act with "due diligence" to exhaust his claim in the state post-conviction hearing. The district court also ruled that Oliver failed to meet the second prong of § 2254(e)(2) because he failed to show that "but for relying on the

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[5] It is not clear whether the district court relied on the Brenneisen interview in making its decision on the merits of Oliver's claim. Instead, the district court focused on whether Oliver was entitled to a hearing and spent little time analyzing the underlying substantive issues.

Bible, no reasonable juror would have answered the special issues in the way that resulted in his receiving a death sentence." The district court then denied habeas relief on his two claims related to the jury's use of the Bible.

Oliver argues that this court should stay and abate the federal proceeding so that he may go back to the state court and obtain a hearing on his claim. The flaw in Oliver's argument, however, is that the state court already refused to grant him a hearing. The TCCA already considered his request to stay the proceeding so that he could seek a hearing regarding the information from the Brenneisen interview, and it deemed Oliver's request to be a subsequent application for habeas corpus that is barred under state law. Oliver presents no arguments as to why the state court would now grant him a hearing. A stay and abatement, therefore, would amount to nothing more than an unnecessary and fruitless delay.

Nor is Oliver entitled to a hearing in federal court. The district court applied the correct standard under § 2254(e)(2) regarding Oliver's request for an evidentiary hearing in federal court.

Section 2254 (e)(2) provides:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

As the district court correctly noted, Oliver fails to meet subsection (A)(ii) because Oliver could have discovered the evidence from the Brenneisen interview through the exercise of due diligence.[6] All

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[6] We make no decision regarding whether the district court correctly found that Oliver failed to meet subsection (B) because, "but for relying on the Bible, no reasonable juror would have answered the special issues in the way that resulted in [Oliver] receiving a death sentence." We note, however, that subsection (B) requires the habeas applicant to show that "no reasonable factfinder would have found the applicant *guilty of the underlying offense*," not that no reasonable factfinder would have imposed the same sentence. 28 U.S.C. § 2254(e)(2)(B) (emphasis added). Oliver's failure to meet subsection (A) makes the district court's application of subsection (B) moot. As to the substance of the district court's statement that the jurors did not improperly rely on the Bible

Oliver had to do to uncover Brenneisen's testimony was to call him to the stand during the state post-conviction hearing.[7]

In sum, Oliver has presented no authority that would allow us to stay and abate this proceeding so that the state court can conduct an evidentiary hearing. Even if we did stay the federal proceeding, Oliver has failed to show why the state court would grant him a hearing after it denied the exact same request in its habeas decision. Further, Oliver failed to meet the stringent standard in § 2254(e)(2) that would allow a federal court to conduct an evidentiary hearing. Congress has decided that a habeas applicant must jump a high hurdle before a federal court can grant an evidentiary hearing, especially when the applicant failed to develop the factual basis of his claim in state court. Therefore, we DENY Oliver's request for a stay and abatement and for an evidentiary hearing.

2. Substantive merits of Oliver's Bible claims

Oral argument will assist the court in determining if Oliver is entitled to habeas relief given the evidence presented in the state court post-conviction hearing regarding the jury's consultation of the Bible during deliberations. Specifically, the

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in making its decision, the court will consider this issue after further briefing and oral argument.

[7] Oliver claims that he did not call Brenneisen to testify because Brenneisen would have been hostile to his lawyer and would not have cooperated. This is mere speculation, however, and does not excuse Oliver's failure to call Brenneisen—or any of the other jurors—at the hearing.

parties are directed to focus on the following two issues: (1) as a matter of law, did the jurors' consultation of the Bible in the jury room constitute an external influence that raises a presumption of prejudice under clearly established federal law, as determined by the Supreme Court of the United States; and (2) if so, has the state rebutted that presumption here? The clerk will issue a briefing schedule for the parties to submit supplemental briefs on these questions and will schedule oral argument in due course.

III. CONCLUSION

We DENY Oliver's request for a COA on his three claims. We also DENY Oliver's request for a stay and abatement or for an evidentiary hearing. The clerk will issue a briefing schedule and schedule oral argument for Oliver's remaining claims.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-70006

U.S. COURT OF APPEALS
FILED
OCT 3 2008
CHARLES R. FULBRUGE III
CLERK

KHRISTIAN OLIVER

Petitioner-Appellant

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

Appeal from the United States District Court
for the Eastern District of Texas, Beaumont

ON PETITION FOR REHEARING

Before SMITH, GARZA, and PRADO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is

DENIED.

ENTERED FOR THE COURT:

/s/ Edward Prado
UNITED STATES CIRCUIT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 06-70006

D.C. Docket No. 1:04-CV-00041

KHRISTIAN OLIVER

Petitioner-Appellant

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

Appeal from the United States District Court for the Eastern District of Texas, Beaumont.

Before SMITH, GARZA, and PRADO, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

ISSUED AS MANDATE: OCT 13, 2008

A True Copy
Attest

Clerk, U.S. Court of Appeals, Fifth Circuit

By:
Deputy

New Orleans, Louisiana OCT 13 2008

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

KHRISTIAN OLIVER,	§	
	§	
Petitioner,	§	
	§	
v.	§	Civil Action
	§	No. 1:04-CV-41
DOUG DRETKE, Director,	§	
Texas Department of Criminal	§	JUDGE
Justice, Correctional	§	RON CLARK
Institutions Division,	§	
	§	
Respondent.	§	

SECOND MEMORANDUM OPINION

Khristian Oliver ("Oliver"), an inmate confined to the Texas Department of Criminal Justice, Institutional Division, filed an application for a writ of *habeas corpus* pursuant to 23 U.S.C. § 2254. Oliver challenged his capital murder conviction and death sentence imposed by the 145th Judicial District Court of Nagcodoches County, Texas in cause No. 27,037, styled *The State of Texas vs. Khristian Oliver.* Respondent Doug Dretke ("the Director") has filed a motion for summary judgment. The court earlier granted judgment as to Petitioner's claims 1-20, reserving ruling on 13 and 14. For the reasons set forth below, judgment will be granted as

to Petitioner's remaining claims, numbers 13 and 14.

I. Background Facts

Oliver began a crime spree about a year and half before the incident which resulted in his conviction in this case. There were over a dozen burglaries and many of them involved the use of weapons. On March 17, 1998, Oliver, his girlfriend Sonya Reed, Bennie Rubalcaba (age 16) and his brother, Lonny Rubalcaba (age 15), stopped at the house of the victim, Joe Collins, in rural Nagcodoches County. Oliver and Lonny Rubalcaba went to burglarize the house, carrying Oliver's .380 caliber pistol, a handful of bullets and bolt cutters. Reed and Bennie Rubalcaba stayed in the truck. While the two were in the house, Collins came home. Collins shot Lonny Rubalcaba in the leg as he and Oliver were trying to escape. Oliver then shot Collins five times. At least two of the shots were fired while the victim lay on his back on the ground outside his house. As Bennie Rubalcaba helped his brother Lonny back to the truck he turned and saw Oliver striking Collins several times in the head with a rifle butt, while Collins was lying on the ground. Collins's skull was severely fractured and his face was disfigured nearly beyond recognition.

Oliver then joined the group in the truck. The group took Lonny Rubalcaba to the hospital and went to the Sheriff's office and filed reports saying that someone had driven by and shot Lonny while they were all at a farm. The next day, deputies picked up Bennie Rubalcaba and questioned him. Bennie then gave a written statement admitting what had actually happened. That same morning,

police questioned Lonny Rubalcaba, who, after originally repeating the story about the farm, gave a second written statement coinciding with his brother's second statement. Police located Oliver and Reed at a Houston motel and arrested them.

II. Procedural history

Oliver was indicted for capital murder, the killing of Collins having taken place during the commission of a burglary. He was tried and found guilty in April 1999, and after a punishment determination hearing, he was sentenced to death. His conviction and sentence were affirmed on direct appeal by the Texas Court of Criminal Appeals, *Oliver v. State*, No. 73,837, slip op. (Tex. Crim. App. April 17, 2002) (unpublished). The Supreme Court of the United States denied his petition for a writ of *certiorari*. *Oliver v. Texas*, 537 U.S. 1161 (2003). His petition for post conviction relief was denied by the Court of Criminal Appeals on October 20, 2002, and his petition for a writ of *certiorari* was also denied. *Oliver v. Texas*, 538 U.S. 1001 (2003).

On January 21, 2004, Oliver filed the present application for a writ of *habeas corpus*. On October 14, 2004, the Director moved for summary judgment as to all of the claims in the petition.

III. Claims

All claims except numbers 13 and 14 were disposed of by the court's previous order. Claims 13 and 14 state:

> 13. The petitioner's right to an impartial jury under U.S. CONST. amend. VI was denied when jurors consulted Biblical scripture which called

for death as the punishment for murder.

14. The Petitioner's right to a punishment determination based upon discretion carefully guided by law, under U.S. CONST. amend. VIII, was denied when jurors consulted Biblical scripture which called for death as the punishment for murder.

IV. Standard of review

28 U.S.C. § 2254 (d) provides that relief in *habeas corpus* may not be granted with respect to any claim which was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was either (1) contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or (2) based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. Pure questions of law and mixed questions of law and fact are reviewed under § 2254 (d)(1), while pure questions of fact are reviewed under § 2254 (d)(2). *Moore v. Johnson*, 225 F.3d 495, 501 (5th Cir. 2000), *cert. denied*, 532 U.S. 949 (2001). Claims fairly presented to the state courts but not adjudicated on the merits are reviewed *de novo*.

28 U.S.C. §2254 (b) generally prohibits granting relief on claims not previously presented to the state courts. If a federal application contains any such claims, the Court will attempt to allow the applicant to return to state court and present them to the state court in a successive petition, either by dismissing the entire petition without prejudice, *see Rose v. Lundy*, 455 U.S. 509, 520-22 (1982), or by staying

the federal proceedings on the exhausted claims. *See Rhines v. Weber*, --- U.S. ---, 125 S. Ct. 1528, 1534 (2005).

If the federal court is convinced that the state court would refuse to consider the merits of such a successive petition, however, the federal court will treat the unexhausted claims as if the state court had already refused to hear them on procedural grounds. *See Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001). The Court does not review such procedurally defaulted claims unless the applicant can establish either that he had good cause for failing to fairly present his claims, and he would be prejudiced by not being given an opportunity to do so in the federal court, or that the Court's failing to address the claims would result in a fundamental miscarriage of justice. *See Coleman v. Thompson*, 501 U.S. 722, 749-50 (1991); *Finley v. Johnson*, 243 F.3d 215, 220 (5th Cir. 2001). If it is not entirely clear that the state court would refuse to hear a successive petition containing the new claims, the federal court will allow the state court the first opportunity to consider them. *See Wilder v. Cockrell*, 274 F.3d 255, 262-63 (5th Cir. 2001).

V. Analysis

Oliver's thirteenth claim is that the jurors consulted the Bible during the punishment-determination phase of deliberations, which denied him a fair and impartial jury. Because this claim was denied on the merits by the state court on direct appeal, and involves a pure question of fact, the question for this Court would normally be whether the state court's adjudication of the claim was based

upon an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.

Oliver originally raised this issue by post-trial motion, and the trial court conducted an evidentiary hearing. The Motion for New Trial transcript shows that Oliver's attorney, Mike DeGeurin, Esq., spoke with all twelve jurors on the telephone before the evidentiary hearing. Oliver and his attorney called four jurors to testify at the hearing. The State opposed this testimony, but the Judge overruled the State's objection and let the jurors testify as to facts surrounding the Bible in the jury room. Based upon their testimony, the trial court denied Oliver's motion and made the following finding:

> And then the ruling of this Court is, that having heard all the evidence pertaining to the occurrence in the jury room in question in reference to the Biblical quotation which is on file in the case, it is the Judgment of this Court that the conduct of the jury was not improper. And that a conscientious, dedicated and caring jury considered this case in accord with the Court's Charge and the instructions of the Court and rendered their verdict in accord with the evidence they heard in this case uninfluenced by any outside influence of any kind shown to the Court in this hearing." The Texas Court of Criminal Appeals reviewed the transcript of the new trial motion and affirmed, determining that the jurors' deliberations were not influenced by their reading the Bible.

Oliver contends that the *habeas* standard of review should not apply, because he has newly discovered evidence. Oliver alleges that a different juror had told a foreign journalist that the jurors did discuss the Bible during deliberations. Oliver tried, unsuccessfully, to raise this claim, with this new evidence, in his state post-conviction proceedings. The state court denied Oliver's request to consider his newly discovered evidence or conduct another evidentiary hearing on July 25, 2002. Oliver objected to the denial of another evidentiary hearing and he now asks the federal court to conduct an evidentiary hearing and receive this evidence, and then determine whether the state court's ultimate finding that the Bible was not an outside influence, was reasonable in light of all the evidence, not just the evidence considered by the state court.

28 U.S.C. § 2254 (e)(2) provides, in relevant part, that an applicant may obtain an evidentiary hearing if the factual predicate of his claim could not have been previously discovered through the exercise of due diligence, and the facts underlying the claim would be sufficient to establish, by clear and convincing evidence, that but for constitutional error, no reasonable fact finder would have sentenced him to death.

Assuming *arguendo* that Oliver could not through due diligence have discovered the testimony of the other juror in time to timely present it to the state court, his request still must be denied because he has not even alleged, let alone established, that but for relying on the Bible, no reasonable juror would have answered the special issues in the way that resulted in his receiving a death sentence. The

Court will deny Oliver's request for an evidentiary hearing on this claim. *See Guidry v. Dretke*, 397 F.3d 306, 327 (5th Cir. 2005). The Court in *Guidry* affirmed the District Court's decision to conduct an evidentiary hearing because the written findings of the state court omitted crucial testimony. *Id.* Unlike the case of *Guidry*, the testimony presented at Oliver's hearing on his Motion for New Trial was not inconsistent. A habeas petitioner can not discredit state court findings on credibility simply because the findings are not explicit. *Id.* In addition, Oliver has not provided this court with sworn testimony from the juror or journalist stating what actually was stated in the jury room. The Court recognizes that the state court findings were sparse, but, as previously stated, the jurors' testimony at the hearing was not inconsistent.

Because the Court will not receive new evidence on this claim, and because Oliver does not dispute that the state court's rejection of his claim, in light of the evidence presented in the state court proceedings, the Court will grant the Director's motion for summary judgment as to Oliver's thirteenth claim.

Oliver's fourteenth claim is that because the jurors consulted the Bible during the punishment-determination phase of the deliberations, Oliver was denied the right to a punishment determination based upon discretion carefully guided by law. Because this claim was denied on the merits by the state court on direct appeal, and involves a pure question of fact, the question for the Court is whether the state court's adjudication of the claim was based upon an unreasonable determination of

the facts in light of the evidence presented in the State court proceedings.

As stated earlier, Petitioner's attorney talked to all twelve jurors, but only four testified at the hearing. Oliver and his attorney had the authority to call all twelve jurors and there is no evidence that the Judge only allowed four to be called, or limited in any way Oliver's ability to call all twelve. It was the decision of Oliver and his attorney to call only four and that evidence is what the trial court had before it when it made its decision. Oliver can not now say a juror has changed his mind or would give a different answer. Even if that was permitted, Oliver has provided no documentation to support the proposition, such as an affidavit from the juror, or even an unauthenticated letter from the juror. The only piece of "evidence" offered by Oliver is an unsworn "transcript" of what an unsworn journalist allegedly claims a juror said. That is simply not enough to meet Oliver's burden of proof.

The analysis of this claim is similar to that of his thirteenth claim, and for the reasons stated above, which are applicable here and because Oliver takes no other issue with the state court's adjudication of this claim and because Oliver has not met his burden of proof the Court will grant the Director's motion for summary judgment as to the fourteenth claim and deny Oliver's request for an evidentiary hearing.

VI. Conclusion

The state court's rejection of his thirteenth and fourteenth claims was not unreasonable in light of the evidence presented to the state court. For the

reasons stated, the Court will grant the Director's motion for summary judgment as to both of these claims. All claims having now been disposed of, a final judgment as to all claims will be entered.

So **ORDERED** and **SIGNED** this 9 day of **November, 2005**.

/s/ Ron Clark
Ron Clark,
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

KHRISTIAN OLIVER,	§	
	§	
Petitioner,	§	
	§	
v.	§	Civil Action
	§	No. 1:04-CV-41
DOUG DRETKE, Director,	§	
Texas Department of Criminal	§	JUDGE
Justice, Correctional	§	RON CLARK
Institutions Division,	§	
	§	
Respondent.	§	

ORDER GRANTING IN PART AND DENYING IN PART REQUEST FOR CERTIFICATE OF APPEALABILITY

This matter comes before the Court on applicant Khristian Oliver's ("Oliver's") request for a certificate of appealability, (docket entry # 36-3) filed on January 9, 2006. The Court, having considered the circumstances alleged and authorities cited in the motion, finds that it is well-taken in part and it will accordingly be granted in part and denied in part.

Oliver was convicted of capital murder and sentenced to death. The Court denied his application

for writ of *habeas corpus* on November 10, 2005. To appeal this decision, Oliver must obtain a certificate of appealability pursuant to 28 U.S.C. § 2253. Subsection (c)(2) of that statute provides that an application for a certification of appealability shall be granted if a petitioner makes a substantial showing of the denial of a constitutional right. To make a "substantial" showing, a petitioner must demonstrate that the issue is (1) debatable among jurists of reason (2) that a court could resolve the issues in a different matter, or (3) that the questions are adequate to deserve encouragement to proceed further. *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983). Because this is a capital case, any doubt whether petitioner's claims meet those standards must be resolved in favor of the petitioner. *Fuller v. Johnson*, 114 F.3d 491, 495 (5th Cir. 1997), *cert. denied* 522 U.S. 963. Oliver requests a certificate of appealability as to nine of his twenty claims. The Court finds that the questions in Oliver's thirteenth and fourteenth claims are adequate to deserve encouragement to proceed further, and therefore issues a certificate of appealability as to those two claims. The Court finds that the issues in Oliver's first, second, third, fourth, tenth, eleventh, and fifteenth claims are not debatable amount jurists of reason, could not be resolved in a different manner, and are not adequate to deserve encouragement to proceed further. Accordingly, the Court denies Oliver's request for a certificate of appealability as to those seven claims.

IT IS THEREFORE ORDERED that Petitioner's Request for Certificate of Appealability [**Doc. # 36-3**] is **GRANTED IN PART**. A certificate of

appealability is issued as to Petitioner's **thirteenth** and **fourteenth** claims only.

So **ORDERED** and **SIGNED** this 2 day of February, 2006.

/s/ Ron Clark
Ron Clark,
United States District Judge

APPENDIX G

VOLUME 44 OF 44

Trial Court No. 7901-98-5

THE STATE OF TEXAS	*	IN THE 145TH JUDICIAL DISTRICT
VS.	*	COURT OF NACOGDOCHES
KHRISTIAN OLIVER	*	COUNTY, TEXAS

HEARING ON MOTION FOR NEW TRIAL

On the 25th day of June, 1999, at 1:40 p.m., the Hearing on Defendant's Motion for New Trial came on to be heard in the presence of the Court, in the above-entitled and numbered cause; and the following proceedings were had before the Honorable Jack Pierce, Judge Presiding, held in Nacogdoches County, Texas:

Proceedings reported by COMPUTERIZED STENOTYPE MACHINE; Reporter's Record produced BY COMPUTER-ASSISTED TRANSCRIPTION.

Jerry G. Poole, CSR #1020
Official Court Reporter-145th Judicial District Court
101 West Main Street, Suite 217
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JERRY G. POOLE, OFFICIAL COURT REPORTER,
145th JUDICIAL DISTRICT

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145th JUDICIAL DISTRICT

CHRONOLOGICAL WITNESS INDEX

	Direct	Cross	Voir Dire	Vol.
McHaney, Kenneth M.	36,58	54		44
Symmank, Maxine K.	59,70	68,71		44
Rodrigues, Rodney W.	72,79	77		44
Webb, Glenda M.	81,86	84,88		44
Oliver, Kermit	108			44

ALPHABETICAL WITNESS INDEX

	Direct	Cross	Voir Dire	Vol.
McHaney, Kenneth M.	36,58	54		44
Oliver, Kermit	108			44
Rodrigues, Rodney W.	72,79	77		44
Symmank, Maxine K.	59,70	68,71		44
Webb, Glenda M.	81,86	84,88		44

EXHIBIT INDEX

DEFENSE NO.	DESCRIPTION		
	OFFERED	ADMITTED	VOL.
Defendant 1	Pencil sketch of Juror Matheny		
	43	44	44
Defendant 2	Pencil sketch of Juror Byrd		
	43	44	44
Defendant 3	Video tape from KTRE-TV station		
	95	97	44
Defendant 4	Passage of the Bible contained in the Motion for New Trial		
	98	99	44

THE COURT: The Court is convening for the hearing of matters set for this afternoon, the State of Texas versus Khristian Oliver, hearing on Motion for New Trial, Cause No. 7901-98-5. And what says the State?

MR. COBB: State's ready, Your Honor

THE COURT: What says moving party, the defense?

MR. DEGEURIN: The defense is ready, Your Honor.

THE COURT: Thank you. And we shall proceed accordingly. The Court has reviewed the papers on file and any briefs that have been filed therein. And you may proceed.

MR. DEGEURIN: Your Honor, I will – I'll call Mr. Michael McHaney first. And I'd like to have the rule invoked for his testimony.

MR. COBB: Your Honor, before witnesses are

called, there are challenges to the motion itself and to the procedure of calling witnesses in this. I think we need to take those up first. The State objects to the calling of any witness that was a member of the jury in this case, and I'd like to state our reasons why.

THE COURT: Yes. You may do so. The Court will take the matter up first, that issue.

MR. DEGEURIN: While we're doing that, Your

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Honor, because it's intermingled I'd ask that the jurors be put in a comfortable place outside the hearing of the motion to stop the gathering of evidence about the trial.

THE COURT: But, of course, there will be no evidence heard at this hearing, so – there will be no evidence heard on this motion. It's argument. And the jurors will not be affected by it.

MR. DEGEURIN: Well, that's the issue, is

whether or not the jurors can testify about certain matters.

THE COURT: That's true. But they're all legal issues as to whether they can testify or not. They're not factual issues. The jury's not going to go be testifying about it. It could not affect their testimony in any way.

MR. DEGEURIN: I see. You're talking about the argument now –

THE COURT: Uh-huh.

MR. DEGEURIN: – would not affect their testimony.

THE COURT: Yes, sir.

MR. DEGEURIN: Therefore, the sequestration request is not necessary at this time.

THE COURT: Yes, sir.

MR. DEGEURIN: I see. Well, because it's such a sensitive matter I would still request it, Your Honor.

THE COURT: The Court will instruct them not to

be in anyway influenced by what is said here. They're all legal matters. You may be heard.

MR. COBB: Your Honor, in the Motion for New Trial there are only two matters raised, I think, which I would anticipate the movement to offer testimony about. They each involve conduct of the jurors or conduct of a juror. One of those matters had to do with what occurred during deliberations of the jury. The other matter has to do with the occurrences in the courtroom during the final arguments. So, to separate those I'll try from time to time as I go through this to keep them separate. I first of all want to address the proposal to call witnesses who would testify about what happened in the jury room. And the controlling rule in present law at this time would be the Rules of Evidence, Section 606(b), which has

developed over a long period of time to restrict to certain

matters those things that can be inquired concerning the

jury's deliberations.

Under the present version of the rule it's restricted

that the jurors cannot testify nor can they give affidavits

which are received by the Court about most of the matters

that occur concerning their deliberations, the conversations

that take place, or things that might have affected and

influenced their state of mind in answering the questions.

Most of that's protected, protected for the purpose of

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allowing the jury to have privacy in which they can openly

discuss together the evidence in the case and the law without

fear of being questioned about their verdict, about being

required to impeach their verdict, or without being harassed

by someone trying to show blame on the jury to substitute for

the blame of the defendant.

And the only matters a juror may testify about, if

they're properly raised, would be whether an outside

influence was improperly brought to bear upon any juror, or

to rebut a claim that the juror was not qualified to serve.

There's no claim that any of the jurors are disqualified to

serve so it narrows the focus of this Motion for New Trial to

only what could be limited by whether any outside influence

was improper brought to bear upon any juror. Even then if

the Court inquired about that through testimony that's

outside the record by hearing testimony of someone concerning

that issue, the issue is only whether there was outside

influence that was improperly brought to bear on the juror.

It's not what the content was. If there was content to some

matter that was outside influence then the Court has to look

beyond that to see whether that was harmful or whether it

constituted reversible error.

But, first of all these outside influences have been held

by all of the cases to refer to matters that actually and

literally are from an outside source. The discussions that

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occur within the jury room for the purpose of that limitation

cannot involve statements made by the jurors, arguments made

by the jurors, or any of the other discussion among the jury

members, because by its definition those would be things

within the jury and not of an outside influence.

To get to that point it's necessary for the Motion for

New Trial to be supported by an affidavit of someone who has knowledge of what would be that outside influence. The motion does not contain an affidavit of someone in a position to know what took place in the jury room. So it's not supported by an affidavit concerning those matters.

The movant has filed a memorandum which cites one case, which in an apology I want to discuss at this time, which is not discussed in our response, response that I previously filed with the Court and also filed or gave a copy of to Mr. DeGeurin. And that case is Smith versus State, Your Honor.

I believe I attached or provided with our motion this morning a copy of Smith versus State. I read that case time and again for four days, Your Honor, trying to understand what it

was talking about. And I think that it's unclear to me

because one of the main things in that case they're looking

at and dealing with is the support of the motion itself by

the affidavits. And I think for that reason Mr. DeGeurin is

referred to, the Smith case in his memorandum.

But, even if it has value to the court for that purpose

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it also has value to the Court, I think I now recognize,

about the Bible. In all of the allegations in the Motion for

New Trial that accuse the jury of misconduct relate to

reading of scriptures from the Bible. And I have also

provided the Court, State versus Martin, or actually Martin

versus State and Branch versus State, a couple of older cases

that refer to scriptures and the Bible in the jury room, both

of which cases hold that that's not evidence and that's not outside influence, or the effect of the case is, is that is not jury misconduct. Those cases were not reversed and the Court recognized that as a potential ground of error, considered it and rejected the idea that the quoting of scriptures, or the reading of scriptures, was error.

In the Smith case the pertinent part is – I'll quote from the case. "Appellant's 12th and 15th grounds of error relate to an alleged jury misconduct which Appellant contends occurred when one of the jurors read "scriptures from the Bible" to the other jurors during the punishment deliberations." The Court holds in a confusing structure as far as the sentence is concerned, "What scriptures from the Bible were read, if any were, and this indefinite allegation,

would not call for a hearing on jury misconduct." So, it's
answering in the form of what procedure is, whether it's
raised, whether it's a proper matter, and says it's not a
proper matter for a hearing and did not call for a hearing on

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jury misconduct.
But it also reads, "What scriptures from the Bible were
read would not call for a hearing on jury misconduct". So,
it's also talking about the scriptures themselves, not just
the procedure of getting there.
And it quotes and cites to Martin versus State, the Court
of Criminal Appeals case, which I did include in the
memorandum that says, "Even though versus were read from
another Bible in the jury room this matter in light of the
record does not call for reversal." That's the case about

reading scriptures in the jury room.

Branch versus State, which was only reversed as to

punishment and not on this matter, says, "We find no

merit" – Well, the question was about jury misconduct if

that occurred during deliberations when one of the jurors

quoted scripture from the Bible to others. The Court said,

"We find no merit in these grounds of error, first, because

the allegations if proved would not constitute grounds for

reversal, and second, because such allegations were not

supported by affidavit of one in position to know what

transpired in the jury room during the deliberations of the

jury, hence, was insufficient as a pleading. They're saying,

in this case it's not be been reversed as to that finding,

that there is no merit to an allegation that reading the

25 Bible in the jury room or quoting scriptures is error.

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1 Your Honor, the rule is clear that merely making an

2 allegation that there's jury misconduct does not even justify

3 having a hearing about that if the grounds themselves will

4 not support a finding that should result from such a hearing.

5 Here there is no proper allegation or pleading because there

6 is no affidavit of someone who was in a position to know what

7 took place in the jury room. The motion is merely verified

8 by the attorneys that represented in court the Appellant, or

9 the defendant.

10 Reading of the Bible, if true, has been held not to be

11 grounds for a new trial. Reading of the Bible, if it was

12 true, does not constitute new evidence as alleged in the

Motion for New Trial. It does not constitute law as alleged in the Motion for New Trial, and does it not constitute the only relevant consideration, and that is, whether an outside influence was improperly brought to bear upon any juror. That's not even stated as a ground in the Motion for New Trial.

Because there are not sufficient affidavits of someone in a position to know and because this is not a matter that would result in a new trial or harm to the defendant it is the State's position, Your Honor, that it is not necessary and would be improper under Rule 606(b) to inquire of the jurors, because the jurors may not testify as to any matter or statement occurring during the jury's deliberation or to

the effect of anything on the jurors' mind or emotions or

mental processes as influencing the jurors assent sent or

dissent from the verdict.

The Movant asks you to find that a juror's personal

experience and background with their religion, with their

Holy Scriptures taints their ability to be a fair juror, and

that they can't bring that in, when all the cases, hundreds

of them have said that it is not an outside influence for the

juror to use their past experience, their common knowledge

and their common experiences as a part of their consideration

in the verdict. What the Appellant, Movant, also ask the

Court to do, is to find that reading the Bible is of itself a

bad thing, that it can never find its place in the jury room

even though each witness who testifies places their hand in

this court on this Bible in this room. As we sit here today

their testimony of the witnesses, including the jurors who

discuss their qualifications in the voir dire, began with

that. To say that that's a bad thing, for the Movant to

represent that that's a bad thing, would undo every trial

from the very beginning.

The rules have developed and the cases have developed

under the rules for the purpose of protecting jurors from the

harassment of a loser in a case who wishes to shift the blame

from the criminal act to the jury deliberations. And that –

the rules have carefully considered what would be proper and

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then restricted the jurors, to keep jurors from impeaching

their own verdict and to keep losers from trying to impeach

their verdict by fishing into everything that took place in the jury room, or by finding blame with the discussions and the conversations that must take place as a part of the normal deliberations. Because if we brought into question all of those things, Your Honor, if we harassed those jurors by asking them, well, what did you say, and then, what did you think, then it wouldn't make any difference what was said, because it could be shown that if it said that in the Bible, if Shakespeare said that or Snoop Doggie Dog said it, if the quote was one thing, "Thou shalt not kill", or if it was another thing, and said, "If you can't do the time don't do the crime," those things would all spoil the jury's deliberations if that was evidence. But it's not. Those

things would all spoil the jury in deliberating if it was

law, but it's not. Those are just things that are part of

our common experiences, and jurors are intended to bring

those things in, unless it's shown to be an outside influence

or improper evidence, which this is not. Then it can in no

way harm a defendant, and it should not even – and it is

prohibited even from being inquired into by testimony or

affidavits from jurors.

For those reason, Your Honor, we believe that this part

of the motion that intends to inquire as to what took place

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in the jury room is improper and prohibited by the rules.

THE COURT: Thank you. And you may respond to

this phase of the argument.

MR. DEGEURIN: Your Honor, I would hope that

you understand that by politely allowing Mr. Cobb to complete

his – towards the end argument as opposed to motion, that

that does not mean I was agreeing with what he said. I found

some of the things he said were quite offensive, because I

didn't allege certain things in my motion. And I didn't say

the Bible was a bad thing. And I didn't say that we

shouldn't put our hands on the Bible when we were sworn. I

didn't say those things. And I hope that the Court is not

persuaded in anyway by those statements by Mr. Cobb. What I

said is in my pleadings. What I've said is been in my briefs

or in the case law that I provided the Court.

There is a problem when something occurs in the jury

room – Neither the prosecutor or the defense counsel are

there. In fact, no one's there except the jurors. And the

only people that can tell what happened inside the jury room
are the jurors.
Now, historically what is – what we do is, the juror
gives an affidavit, not as to how their mental processes
worked, but as to operative facts. In the Court of Criminal
Appeals opinions that I gave you the Court talks about, they
can talk about what happened, and they can talk about what

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was said, but not how it affected their mental processes.
That we don't want to go into. And then the courts say, you
look at the character of the evidence, character of the other
matters that came inside the jury room, and you see if it is
something that could be harmful. You don't ask the jurors
was it harmful. And so that's exactly what I did.
Now, here's what happens in reality and here's why we

have all these cases with the juror's testimony in them,

where the Judge has the jurors testify and discuss, and then

limit the questions to the jurors while they're being –

testifying so that they do not – you don't invade the mental

processes of the jury. That's why case after case after

case – he said hundreds of cases about Bibles. I don't know

what he's talking about. But there's hundreds of cases where

new trials are granted because the juror testifies this is

what happened, and the Court finds that that matter was not

something that was debated in court, was not subject to cross

examination, did not have all of the due process things that

make it something that is admissible and permissible to

control or to effect a verdict.

We've had – the Court is well aware of where a juror

talks about parole laws. And so then the – the cases come

where you analyze what they actually said about parole laws.

We have tests for that, what was said in the jury room, not

how it affected any of the jurors but what was said. And

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that's how we determine whether or not a new trial is

required.

In Smith versus State we have a situation that is similar

to this case in the sense that all of these good jurors spoke

to me on the phone and they told me matters that I put in the

Motion for New Trial, but none of them wanted to give an

affidavit. Smith says in a situation like that you cannot

prevent the truth from coming to court because simply there's

no affidavit. In a case like that what you do is, the lawyer

gives an affidavit as to what the juror told him, and then
the Judge can have the hearing. Otherwise, all you have to
do is have jurors saying, I just don't want to do this. It
is a tough case anyway, I don't want even – I don't want to
be back in court. So, obviously across the nation that is
recognized as the proper way of doing it. And it's
recognized by the Court of Criminal Appeals.
So, the fact that the jurors were unwilling to give an
affidavit as to the truth is not something the State can rely
upon to execute someone just because they didn't give an
affidavit, or not even have a hearing – don't even make of
record the truth of what happened because there's no
affidavit. No. The Court says that is not going to be a
barrier to the Court seeking the truth. Take the affidavit

of the lawyer, have – The lawyer can't testify, but the

jurors can about what happened. No one else is in the jury

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room. Hearsay would not be admissible as to someone outside

the jury room hearing that the jurors discussed the Bible.

The jurors are here to testify about that.

Now, with regard to Bibles in the jury room, there are

case after case after case that have been reversed because of

that. There are – there is one case, Branch, that in a dual

duplicitous holding, Judge Woodley – you may remember Judge

Woodley.

THE COURT: Yes.

MR. DEGEURIN: Says this is – Reading

scriptures is okay. But there's been a lot of cases – that

was 1969, Judge.

THE COURT: I recall. I read that case.

MR. DEGEURIN: Yeah. That was a 1969 – It

hangs by itself. There is many cases across the nation as

well as Texas that discuss Bible, and that it's not proper

because – It's obvious – that if passages of the Bible have

some relevance to the law to the extent that it's maybe even

inconsistent with the Charge of the Court, unless we took six

or seven days in final argument on each case to discuss each

and every possible passage in the Bible that might be

discussed and utilized by the jury, you would never have the

due process rights that the court of law assures you. You

cannot – you cannot say the Bible is good as Mac Cobb says

or as bad. That's not the –

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You take a particular scripture, and if that scripture is

read in the jury room, and that scripture is – Let me back

up and give an example. We had a case where a juror said, "I

was robbed" – This is in the jury room. "I was robbed years

ago and I remember what the man looks like three years

later." That case was reversed because in that particular

case there was – there was some sort of either robbery or

rape or something and identity was an issue. That outside

influence, although it was said in the jury room, it didn't

come from – I mean, it was outside because the robbery of

the juror had occurred outside the jury room and outside the

courtroom. That statement caused reversible error because

there was – the issue was identity.

Now, in the most recent cases of the Court of Criminal

Appeals they say, what you do is you have the juror – you

figure out what scripture was read, or what was said in the

jury room. And then you say in light of the issues in the
case is there a problem? And so in Smith, I believe it was,
one of them, it said, a juror said I can identify somebody.
But in the case at the trial identity wasn't even an issue.
It was consensual rape, or something to that – I think
that's what it was. So, the Court of Criminal Appeals said
the fact that this was said, which is outside evidence,
outside testimony, outside influence, doesn't matter in that
particular case because identity wasn't even an issue. And

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that makes sense. We understand that.
In a capital murder case where the capital – the death
penalty statutes have gone under quite a bit of revision to
try to make it as fair as possible requires many things
before you execute a young man.

JERRY G. POOLE, OFFICIAL COURT REPORTER,
145th JUDICIAL DISTRICT

And in the federal courts, for example, the many times that they reverse for Bible reading in the jury room, "How the jurors use the Bible, whether as a silent monitor witnessing that the jurors approach their solemn task in the proper attitude, or for guidance as to their specific task, the Court cannot ascertain. Bible in some places rejects the drawing of distinctions in murder cases, but state law requires distinction between murder and capital murder. Some parts of the Bible also disparage mercy as a valid sentencing consideration contrary to law of the federal circuit or of the state. To disparage mercy is to strike at the most important component of a capital jury's discretion, favoring capital defendants." In that particular case – This is out of Georgia.

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145th JUDICIAL DISTRICT

In the State Court they had something similar to us.

They have a mitigation section. They read Numbers, discussed

it. Someone read it out loud in the jury room, that that's

where they're talking about a person who takes another's life

by hitting them with a stone shall be put to death. This is

the Lord's law. I mean, I'm paraphrasing.

20

THE COURT: Yes.

MR. DEGEURIN: I set it out. The federal

courts find no hesitation in finding that that – there's

nothing with having a Bible, nothing wrong with having your

personal Bible, nothing wrong having your personal – pulling

your only personal strength from the Bible. Just like you

can have – you can take notes, but you can't read your notes

to the other jurors. And you told them that.

You can have your own interpretations of your philosophy

but you can't take an outside influence, something that has not been debated or talked about in the courtroom and discussed and debated and cross examined, you cannot take a Bible in, open up a passage and read it, because then it becomes an outside matter inside the jury room beyond the safeties of the state due process rights to insure a fair trial under civil – no, criminal law. So, you cannot have a trial out here with all the rights and duties, and assure that nothing goes back there that hasn't been, that the Court hasn't given both parties adequate time to discuss and debate, and then the Court give the Charge. Instead, you have something happening in the jury room that is outside. It is the Bible. And in this particular case the passage that was quoted to me by some of

the jurors was the one that I put in the Motion for New Trial, almost word for word by some of them.

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So, the point is this, this Court has a duty to see that a record is made. And if this happened as set forth in the Motion for New Trial then the Court can determine whether the character – this is the Court of Criminal Appeals speaking – "The character of the outside matter in light of the issues of the case had an affect". Not what effect it had, because we can't – you're not suppose ask the jurors – The State can't ask them, "Well, even though it was done you didn't pay attention to it, did you?" Nor could I ask, "And did that happen some influence on you or giving you some comfort in deciding the case in a certain way when you were undecided?" What can be asked is, "Was this outside matter

used for guidance?" Yes. How did it guide you we cannot
ask. The cases are clear on that. But asking what
scriptures were read, how many people had their Bibles there
is very much something that is in issue and relevant to is
the issues in the Motion for New Trial.
So, I – if the Court needs any time to read any more of
those cases I – I would ask to you do so. It is true that
on appeal, it – the Court will first look to whether it was
an abuse of discretion to prevent the evidence from being
gathered at the Motion for New Trial. But cases have held it
was an abuse of discretion where the matters that were
alleged, were Bible verses, or parole law, or a couple of
other matters. So, – and, of course, the Writ of Habeas

Corpus is another way it happens. And then you don't have quite the same rules as with regard to the restrictions. So, for – and they have – They say, in light of the Judge's experiences, education and experiences in court, you are to make the call. Is this matter, the scripture being read, brought out and discussed by the jurors during deliberations, is that relevant to any issue in the trial that was decided by the jury such as death or not death. So, I'd ask the Court to allow me to call the witnesses. I'll – None of the witnesses will take more than a few minutes. I've talked to them all before. Now, I will say that they have all, as I understand it, talked to the State since I have talked to them. Some of them were called down to the District Attorney's office and

spoken to. So, I don't think the prosecution is doubting that what I alleged occurred. It's just they are trying to prevent it from becoming of record.

MR. COBB: May I respond for just –

THE COURT: You may.

MR. COBB: – briefly, Your Honor. I expected to represent that the cases held that the Bible being read or quoted in the jury room was not error or grounds for new trial. I may have overlooked cases, but I diligently attempted to research the law in Texas cases on that, and found no case that said that it was error in a Texas case.

If Mr. DeGeurin has cases, I think he said there were many of those where cases were reversed because the Bible was in the jury room. I'm not aware of those. I apologize for the inadequacy of my legal research. I in no way intended to

withhold cases contrary to my position from the Court.

I would like an opportunity to read those cases, maybe

even that Georgia case. But, Your Honor, honestly I did not

know that there were – I did not find any case that allowed

in Texas that the jury could not read the Bible or that would

be reversible error. If I misrepresented that it was

entirely unintentional. I would like to see those cases

before we go forward.

MR. DEGEURIN: I'll give them to you. There's

Jones versus Kemp. 706 Federal Supplement.

MR. COBB: K-E-M-P?

MR. DEGEURIN: K-E-M-P.

MR. COBB: Say again. I'm sorry.

MR. DEGEURIN: 706 Federal Supplement 1534.

MR. COBB: Is that a Texas case?

MR. DEGEURIN: No. It's a federal case. It's

reversing a State of Georgia capital case because the Bible

was read during the sentencing phase of deliberation.

State versus Herrington. Now that – this is a – I was

trying to find something that was specific to our particular

facts. And the State versus Herrington is 627 SW2nd 345.

24

That's a Tennessee case. And there during the – the jury

foreman read a passage from the Bible to buttress his

argument for the death penalty. And they said, of course,

that's reversible error.

The federal case I called to the Court's attention and

given to counsel is particularly important because it's

talking about your constitutional right not to have matters

in the jury room, Bible scriptures, that were not part of the

Court's Charge, discussed and debated or talked about and

evidence put on during the trial of the case.

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145th JUDICIAL DISTRICT

I don't shy away from the Texas cases at all. The Bible case that was not reversed in Texas was where they said there were scriptures read. They didn't say which ones. And there was no affidavit, even from the lawyer, in that case. And they held that we don't even know which scripture so we can't whether that particular scripture had any relevance to any issue at the trial. And I told you about the Branch case, the Woodley case.

So, there is no cases saying – there's not a single case that says the reading of a passage from a dictionary, or from a Bible, or from a medical book that's not in evidence, there's no cases saying that's not reversible error. Mr. Cobb would say reading from the Bible is not. There is no cases saying that. There's reasons that they by virtue of

25 one matter or another it's not reversible. But you know, –

25

1 you're aware of cases, Judge, where they read, someone has a

2 dictionary and reads the definition of a word in a Bible –

3 in the jury room, which is reversible error. The only

4 difference today is that the Court is saying, let's look at

5 the passage read, and let's see, or discussed, and let's see

6 if it has nothing to do with anything that had to do with the

7 trial and then we don't have to remedy it. But, if it has

8 something to do with it, then we'll take another look at it.

9 What the State is saying is, don't even look at it, prevent

10 the hearing.

11 And so I ask again, Judge, that you allow us to put on

12 the evidence and then you can make your decision

13 appropriately.

THE COURT: Anything further?

MR. COBB: Not from the State, Your Honor,

THE COURT: Well, suppose we brief out those two cases that have been raised that you made a note of and review them and see what they have to offer.

MR. COBB: I'd like to, Your Honor. I did not cross those cases through my research because they weren't Texas cases.

THE COURT: Suppose you could send someone from your office down to draw it out of the computer if it's on the internet. I assume that's where you're going to get it from. I have the federal reporters though however here in

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the library.

MR. COBB: Yes.

THE COURT: And can they have your office make copies for all parties involved, including the Court, and we can all review it.

MR. COBB: Are your Southwestern Reporter Texas cases only?

THE COURT: Yes, they are.

MR. DEGEURIN: Judge, here's a case that you could read during the brief recess –

THE COURT: – I said that. I don't think that's correct. Some of them are, but not all of them. Yes, sir.

MR. DEGEURIN: Buentello, I have a copy of, and this is one that's – it's a '92 case.

THE COURT: Yes.

MR. DEGEURIN: And it has both good and bad things from my standpoint, but it's a good discussion. And I would ask the Court to read it. It just – it assumes through its discussion things that are obvious.

THE COURT: Yes.

MR. DEGEURIN: How could you ever – How could you ever bring up things that happened in the jury room if

you took the position that the State is taking is, that it

has to be something that comes from outside into the jury

27

room. You can't ask anybody in the jury room if it came in.

It just doesn't – that doesn't make sense. You don't know

unless someone overheard it coming in or something. Any

rate, if I can be –

THE COURT: Let counsel's office make a copy of

it and that way they can make a copy for the Court and for

him at the same time. Do you mind?

MR. COBB: No, Your Honor. We have that case.

And as the Court considers this, and I urge that you do.

This Buentello case was decided prior to the change in Rule

606(b).

But there's one other thing that we might as well

consider now as we consider this case. If there is going to
be testimony, and Mr. DeGeurin has related a similarity
between the passage from the Bible which he alleges is law
from outside, evidence or law, and the discusses about the
parole question Buentello says that if you do consider
those matters that you consider the effect, in that you apply
what's called the Sneed test, of deciding whether someone
represented it as law, who suppose to have known what the law
was, represented it as a fact about the law, and that it
influenced a juror.
So, that if we do get into that inquiry I think that we
also must inquire then about the effect of the passage on the
jurors, because the Sneed test is still intact. The

Buentello case is still intact, but it's limited by Rule

606(b). And so that's something else we ought to consider about that testimony if the Court chooses to hear it.

And I will make copies.

MR. DEGEURIN: Okay. I thought you had it attached to yours.

MR. COBB: No. We recite it, but we didn't have a copy attached.

MR. DEGEURIN: Okay. I want it back.

MR. COBB: Yes.

MR. DEGEURIN: No. The Court say – they actually make a distinction between parole, unless someone brought in a piece of paper and said, "This is the parole law". If someone says, "I have a friend that went to jail and he got out in two years", that's a statement about parole. In those circumstances it has their own test, and you do ask for the effect. The Court's make it very clear that you do not, and I've cited both cases, the Rogers case

and the other in my – and I'll cite them to you again –

There's two cases that say, "With regard to outside evidence,

matters, influences coming into the jury room, you determine

what they are and the character of them, and you determine

from that if it's relevant to any issue in the case, but you

do not ask what effect it had on a juror". So – And that's

clear.

29

The only exception to that is Sneed with regard to parole

laws. And in Sneed it does say that if someone says this is

the law, did they purport that they knew the law when they

said it? Did you think they knew the law when they said it?

The difference here is the actual Bible scripture was in the

courtroom – I mean, in the jury room, in the book. Okay.

THE COURT: How long do you think you will be making the copies?

MR. COBB: Fifteen minutes at most, Your Honor,

THE COURT: Well, suppose we take an evening recess and gather up the material and then we'll convene again.

THE COURT: Mr. Bailiff you may recess the Court for about 15 or 20 minutes.

(Short recess)

THE COURT: The Court is reconvening. All the parties had time to review the important authorities that have been provided, and we shall continue. Any further comment to be made by the moving party, the defense?

MR. DEGEURIN: Your Honor, the actual quotation out of the Texas case about where there's no, where no juror would sign an affidavit – I don't know if the Court had an

opportunity to read that particular section – but –

THE COURT: Oh, it clearly provides for the filing of an affidavit, that none was available.

30

MR. DEGEURIN: Right. Where it says, "This is not the exclusive method, where the Appellant is unable to secure such an affidavit" –

THE COURT: That's correct. No question.

MR. DEGEURIN: You read the – Okay.

THE COURT: No question about it.

MR. DEGEURIN: Okay. And with regard to the federal case that held that it was an error of constitutional magnitude for a Bible to be used in the – to go to the jury room was –

THE COURT: Now, what case are you reading from?

MR. DEGEURIN: That's the Jones versus Kemp.

THE COURT: Yes.

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MR. DEGEURIN: Federal Habeas Corpus case –

THE COURT: Yes.

MR. DEGEURIN: – after the direct appeal had been denied. In sum it was constitutional error for the Court to permit -- Now, that's a little bit different because in that case the Court permitted the Bible to be in the jury room.

THE COURT: Uh-huh.

MR. DEGEURIN: They cite cases, of course, that say –

THE COURT: Yes.

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MR. DEGEURIN: – of course, it's error for a Bible to be referred to during the jury deliberations. I just wanted to point those two section out now that we have the actual cases before the Court.

THE COURT: Yes. And the State may be heard.

MR. COBB: Yes, Your Honor. Referring to the

same page that Mr. DeGeurin did in Jones versus Kemp, that federal case, where as the jury went out, in the Tennessee Trial Court – the Georgia Trial Court, as the jury went out they asked if the Bible could go into the jury room with them. And the Court said, "Yes." The paragraph above where Mr. DeGeurin read from, the opinion states, "The sole issue here involves the at least implied court approval of group jury reference to an extra judicial authority, here the Christian Bible, for guidance in deciding the exclusive statutorily mandated carefully worded guidelines which must be followed by a jury deliberating during the sentencing phase of a death penalty case". It states the sole issue involves where there's court approval of that in advance of

the deliberations, a different matter than we have here.

THE COURT: I understand.

MR. COBB: The Buentello case from 1992, which

is still case law subsequent to the change in the rule, I

think does guide the Court about what to hear if the Court

hears testimony. And says on page 614, "We hold that the

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test for admission of juror testimony at a hearing on a

Motion for New Trial is not whether the conduct constitutes

an overt act, but whether the matter sought to be elicited is

deemed by the trial court to be relevant to the validity of

the verdict. What is considered relevant will be determined

on a case by case basis, taking into account the Court's

experiences and observations, the grounds for new trial set

forth in Texas Rules of Appellate Procedure 30 (b), and the
case law which was developed under the predecessor to 30 (b).
Thus, the test adopted in Sneed is still a viable means of
determining whether a jury discussion of parole law
constitute reversible error."
They're not saying – they're only using their new finding to say that the Sneed inquiry is still appropriate,
that you look to what this has as an effect on the jury. So
they're saying, and I think extending beyond just parole law
cases, they're saying that the Court looks at whether this is
relevant to the validity of the verdict. And, I think in
order to do that, Your Honor, you would have to understand
what went on in the courtroom when it occurred, what the
effect of it was, not how it operated on the jurors' minds,
but at least in how it fit into the scheme of the

deliberations, whether it occurred at the very beginning,
whether it was stated as law, whether it was a passing
mention heard by all or a brief mention by some. All of

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those factors the Court has to look at in order to judge it
on a case by case basis. There is not a firm rule that says
you can't do it. In fact, that is the approach that the
courts have taken in those cases about whether a dictionary
was used or whether right to remain silent, for instance, was
discussed. The Court has to hear about whether it was
discussed as a passing mention or whether it was discussed in
great detail or whatever.
And so, if you inquire, Your Honor, I think have you to
inquire sufficiently to have an understanding of what

occurred so that you can apply your experience and observations of the trial as a whole to see if it was really relevant to the validity of the verdict. That's a separate issue from whether you should hear it. But the case – the federal case certainly does not state that at all times when a Bible appears in the jury room that it is automatically reversible error. It only says that because of the Court's implied approval by the Court permitting Bible to be taken at the request of the jurors, that gave it a more impressive aspect for the jury's consideration, as if it was the Court's approval. And that's not what the says we have here of course.

THE COURT: Thank you. Anything further?

MR. DEGEURIN: Judge, on that last point about

the, parole – Sneed and parole considerations is a section by

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itself. The Court of Criminal Appeals says, in other

evidence outside influences coming in, in those cases, "It is

the character of the evidence that controls the determination

of the issue, and the Court will not speculate", and in other

cases say, "or hear evidence on the probable effects on the

jury or the question of inquiry". And that's the Court of

Criminal Appeals –

THE COURT: Yes, I reviewed it.

MR. DEGEURIN: In Rogers. Okay.

THE COURT: I don't question that.

MR. COBB: I don't either, Your Honor. I think it is clear though that what they mean by "character of the evidence" does not just mean the quote in black and white, but the character of how it became before the jury.

THE COURT: Yes. One of the great failures of trial judges, or the Appeals Court in particular is, they kind of sometimes speak in the abstract. In fact, in all of the cases they've yet to actually firmly and properly define some of the terms that are controlling in this very matter, such as "outside influence," and many other matters that they yet to really – In that first case from 1969, where the Court so emphatically stated, you know, that the reading of the Bible was never a matter that was harm in the trials, a careful reading of that shows that the reason why that statement was made was because they did not allege what part

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of the Bible was read to the jury or offered to them. And that was the basis of the Court's statement in the matter.

But on the phase of it, it appeared to mean much more but it

didn't.

But nonetheless the scope note does the best job of

explaining it where that someone summarized it and so forth.

But there are many interesting cases here. There are a

number of cases here where that the jury has been permitted

to delve into their verdicts and so forth where there's been

testimony given to the jury, such as where you cited the

instance of the dictionary being controlled. Of course, when

you bring the dictionary in you're prohibited specifically

from not going into the dictionary and other books as a

juror. And when it is brought it, it actually changes the

Charge that's submitted to the jury, because it becomes

something that they're considering that is not authorized by

the Court's Charge.

But anyway there are a lot of interesting cases here.

Some of the cases turn on the point of testimony being

offered in the jury room by a juror. And they just adapt

that term on it. But, they have reversed them based upon

such matters as jurors insisting on giving outside

information about a juror's prior criminal record. I'm sure

you all are familiar with that. So there are a number of

interesting matters here. But all of them taken together

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though come back to a very basic concept in this matter. And

I just discuss the cases briefly with you as a background for

that. I wish time permitted. I'd like to go through each of

the cases with you and point out what the Court finds to be

distinguishing factors in them. But, that is not necessary.

The primary determination to be made is, what will be the

scope of this inquiry in reference to the conduct of the jury

in having a Biblical passage before them at the time. That's

the issue we're speaking of for the Court's ruling at this

time. There are other issues in the case. But that's the

primary issue that we're concerned with. And it's the

Court's opinion as follows: And that is, because the courts

all agree upon one thing, and that is, as each attorney has

spelled out, that it has to do with the nature and the

circumstances under which the matter was considered or was

before the Court, the jury. And the Court's of the opinion

that there's no way for Court to determine what those facts

and circumstances were or what occurred. And counsel for the
State even has indicated in your final argument to the Court
that that's a matter to be considered, is what did occur;
what happened; how was it used. But we can't go into the
effect it had upon the jurors. And we have to be very
careful about avoiding the effect it had upon any juror, if
any. It's a matter of simply determining as best we can to
ascertain the truth about what occurred in the jury room.

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Now, the question of whether it's outside influence or
whether it is an outside influence, or whether it was outside
influence brought to bear upon the jury to influence their
verdict, that's a matter that we'll look at. But first we
have to learn what did occur. All we have now is an

affidavit, which under the law is authorized, and under the facts and circumstances, and the Court so finds that the rule has been complied with, which authorizes to open the door as to what occurred in the jury room. And that's what the Court plans to do, is to hear very carefully what did occur. All we have now is an affidavit, and we need the facts. And then the Court upon that limited information will then rule further in the case. So, assuming that we all understand the rule, it is to ascertain what did occur in the jury room and in reference to the Biblical passage, and that includes how was it used, things of that nature. But we must stay away from what influence it had upon any juror in their verdict in the case. Is that agreed upon, –

MR. DEGEURIN: Yes, Your Honor.

THE COURT: – those limitations?

21 MR. DEGEURIN: Yes, Your Honor.

22 THE COURT: Anything further from the State?

23 MR. COBB: No, Your Honor.

24 THE COURT: Anything further from the defense?

25 MR. DEGEURIN: No, Your Honor.

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1 THE COURT: Then you may call your first

2 witness.

3 MR. DEGEURIN: I call Mr. Mike McHaney. And at

4 this time I would like to have the rest of the jurors

5 sequestered.

6 THE COURT: Oh, I don't mind sequestering them.

7 They're all here though as good citizens and good jurors.

8 And I don't think any one of them is going to be influenced

9 by what the other one testifies to. I think they're all

10 going to be independent.

11 MR. DEGEURIN: I'm not alleging that –

12 THE COURT: – Oh, I know you're not.

MR. DEGEURIN: – that they would do something

like that.

THE COURT: I know that.

MR. DEGEURIN: I have – when I spoke to them I

told them the issue would not be the effect on anybody but

what occurred, and that what they told me had occurred. I

may have said others have told me similar things –

THE COURT: The Court will grant your request.

MR. DEGEURIN: Okay.

THE COURT: And it certainly didn't mean to

imply that you were doing or denying –

MR. DEGEURIN: Thank you, Judge.

THE COURT: – some right to them.

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Now, ladies and gentlemen of the jury panel, very briefly

the Court's going to ask you to retire. And we'll make you

as comfortable as possible. You may either use the grand

jury and jury room if you like, or you may be in the Court's chambers, or wherever you desire to be during this period of time. I don't suggest that you be in the lobby, but you can be in any of those quarters, the law library – You're familiar with all those areas. What's your pleasure? Do you want to be in the jury room? Do you want to be back in the Court's chambers. Do you have one? Yes. Thank you. You may have the witness.

KENNETH M. MCHANEY,

after having been duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

(QUESTIONS BY MR. DEGEURIN)

Q. Mr. McHaney, you've been in the court while the Judge made his ruling about the limited inquiry we can make. Is that correct?

A. Yes, sir.

Q. All right. And I'm going to try to ask questions in such

a way that don't get into areas about what the Bible passage,

how they effected you.

A. Okay.

Q. All right. During the deliberations in the trial was

40

there a Bible brought to the jury room, a Bible, or Bibles?

A. Bibles.

Q. Okay. Was there first one and then others were brought

during deliberations?

A. No.

Q. And how many –

THE COURT: What's your answer? Your answer

was, "Yes".

A. No.

THE COURT: No. Thank you.

Q. (By Mr. DeGeurin) So, were there four Bibles?

A. Approximately. I couldn't say for sure, but that's a good guess.

Q. You have quoted sections of words out of one of the scriptures that was discussed in the jury room. Do you – did you know the name of the scripture of that particular deal when you were quoting them?

A. When I was quoting them?

Q. Yes.

A. I wasn't quoting them.

Q. Now, do you recall talking to go Ms. Heather Petersen?

A. Yes.

Q. Would it be helpful to play a portion of what you quoted on the telephone?

A. Not really. I can remember.

41

Q. Okay. You can remember?

A. Yeah.

Q. Okay. Good. I'm sorry. I thought maybe you were saying

you couldn't remember. Would you tell –

A. I never read the Bible aloud.

Q. All right.

A. I read it for myself.

Q. Okay. Would you tell us first of all what section were

you directed to that you read? Not the name, but tell us –

A. Yeah.

Q. Tell the Court –

THE COURT: Counsel, may I suggest –

MR. COBB: Yes.

THE COURT: – that if he read it himself and

he didn't read it aloud to the jury it's immaterial to this

hearing.

MR. DEGEURIN: Well, I kind of jumped forward.

THE COURT: I understand. But we're not

allowed to enlarge the issue as we go. The issue is what

effect the reading of the portion brought by the juror to the

jury set forth in your motion. What he had in his mind is

not inquireable about.

Q. (By Mr. DeGeurin) Was there discussions about, not how

it effected anybody, but was there discussions about portions

of the Bible during the deliberation?

42

A. Can you make that simpler?

Q. Yeah. I believe what you told us before is that one of

the jurors mentioned that a certain section of the Bible that

had to do with who is a murderer and who should be put to

death.

A. Yes.

Q. Is it true that you then wanted to read that section of

the Bible yourself?

A. Yes.

Q. Okay. And when the person was referring to that section

of the Bible was there Bibles in the jury room?

A. Yes.

Q. And who was the person that first pointed out the section

having to do with who is a murderer and who should be put to
death?
A. As – So I understand this – I'm not trying to redirect
question or anything. You're asking who was the first to
bring it before the group or –
Q. Bring it before the group or to bring it before any
particular person, I guess in this case before you?
A. The person who brought it before me had their Bible
marked with many different passages. She was reading one,
and I inquired to her could I read that. So I got it from
her. And I started reading several that she had. And the
one you're talking about was one of them.

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Q. And that's the one you told us about on the telephone?
A. Yes.
Q. And that's the one that says if a man strikes someone

with an iron object so that he dies he is a murderer?

A. Among other things, yes.

Q. Yeah. And can you just from your own memory tell the

Judge some of the other portions that you remember?

A. It says that if a man strikes another man – I think it

goes through a couple of different ones, maybe, an iron

object like you're saying, a rock, and maybe his hand, or not

hand but maybe a wooden object.

MR. DEGEURIN: May I approach the witness, Your

Honor?

THE COURT: Yes.

Q. (By Mr. DeGeurin) I'm going to show you the actual

Motion for Now Trial that sets out – Have you seen this

before?

A. Yes.

Q. Okay. Would you look at that actual quotation there and

tell the Court whether or not that's the one that was
discussed, and that you read personally after it being
discussed?
A. Now, being discussed that's something different. But I
did read this one. This is the one.
Q. All right. And how did you know to go to that particular

44

one?
A. It had been highlighted in her Bible with a highlight
marker as one.
Q. Like a yellow highlighter?
A. Pink, I think.
Q. Pink. Do you recall that juror's name?
A. We talked about this, and I – one the two that I was
saying. I think that it would be the 36 – I'm embarrassed
that I don't know.
THE COURT: That's all right.
A. – the names after being with them for so long.

Q. Did – did you – have you learned that Mrs. Matheny's
father died yesterday or day before?
A. Yes.
Q. She is not here today, is she?
A. No.
Q. And the person who had marked the relevant portions of
the Bible in pink is she one of the ladies that has been
subpoenaed here today?
A. No.
Q. Okay. Of course, you would recognize, or I suppose –
A. Uh-huh.
Q. – if you saw her again.
MR. DEGEURIN: Judge, you all teased me about
my sketches, but this it may actually come in handy here.

45

THE COURT: All right.
MR. DEGEURIN: If I can find them again.
THE COURT: Counsel, I think if he'll just

describe the lady we can name the person for him.

MR. DEGEURIN: Yeah. Well, I actually had them

all on one page, but that's the one I can't find in my haste.

Q. (By Mr. DeGeurin) First of all, I'll ask you about

Shirley Thorton, who was Juror No. 7.

A. No.

Q. That wasn't her?

A. Nuh-uh.

Q. And then there's Glenda Webb?

A. She's here. No.

Q. All right. Juror No. 9 is Donna Matheny.

A. Okay. Show me the other one, the other one we talked

about in between those two.

Q. You have to say that out loud.

A. Oh.

Q. It's not Matheny, or do you know?

A. Could I see the other one that we were –

Q. Yes.

MR. COBB: Your Honor, maybe we could have the

whole book marked as an exhibit and entered into the record.

THE COURT: We all been anxious to see his drawings.

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A. He's pretty good.

Q. (By Mr. DeGeurin) This is Patricia Byrd, Juror No. 2.

A. Donna?

Q. Uh?

A. Donna.

Q. Donna Matheny.

A. That's who it would be. It's not that one. Those are the ones we talked about, right?

MR. DEGEURIN: I will introduce those two as the ones he identified, Your Honor.

Q. (By Mr. DeGeurin) There is another one let's rule out

THE COURT: Well, I perhaps might have misunderstood the juror, but I thought he pointed and said this is the one it would be.

MR. DEGEURIN: Yes. When he saw the drawing of

Mrs. Byrd –

THE COURT: Yes.

A. I knew that it wasn't her.

THE COURT: Oh, I'm sorry.

A. I knew it was between two, her and the other one.

THE COURT: So you think it's Mrs. Byrd.

A. I think it would be the other one –

THE COURT: Yes.

A. – what I would –

Q. (By Mr. DeGeurin) So, just to make sure I'm going to

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show you Mrs. Matheny once again.

A. Could I see my sketch?

Q. You're not going to like it. You lost weight since then.

A. That's who I would say.

Q. That would be Juror No. 9. Her name is Donna Matheny.

A. That's who I would say it was.

MR. DEGEURIN: Your Honor, I will at the

appropriate time –

THE COURT: Surely.

MR. DEGEURIN: – introduce as Exhibit One,

that sketch of her.

THE COURT: You may do so.

MR. DEGEURIN: And also the one of Mrs. Byrd.

THE COURT: Yes.

Q. (By Mr. DeGeurin) Would you tell us in your own words

not what, just how it came about that you – that that the

highlighted portions of the scriptures came to your attention

from Mrs. Matheny?

A. I was sitting beside her on this side of the jury table,

and she was to my right, and she had it out, and she was

reading, and I looked over and I saw it. And I kind of

looked over her shoulder and read. I think that sort of

bothered her so I asked her if I could just pull it over and

read it.

Q. Did she say why she had highlighted them?

A. Not really. She said there's a couple of good ones in here. And that's basically all she said, and she highlighted several of them.

Q. Good ones meaning good ones that, being relevant to what you all were doing in the jury room?

A. I guess. Not –

THE COURT: Well, now just a moment, please. Unless he knows he can't testify to that, you know. That's just an assumption. She says here's a gun good one. That's a common term in referring to Bible passages. Here's a good one. Here's a good one.

Q. (By Mr. DeGeurin) Well, did you see the relevance of the passage that talks about what acts constitute murder and what the punishment is suppose to be according to God's law? Did you see that in that passage?

A. Well, are you asking me if I saw right or wrong, or what?

17 Q. Well, you described the passage that she had marked.

18 A. That one.

19 Q. That she gave to you to read –

20 A. Uh-huh.

21 Q. – was – happens to be the passage that describes what

22 is murder according to this translation of what God was

23 telling Moses. Would that be a fair statement?

24 A. Back then I would say there's probably more ways.

25 Q. Uh-huh. More ways?

1 A. To commit murder than just what's here.

2 Q. Yes. But this has to do with either striking somebody,

3 right?

4 A. Uh-huh.

5 Q. Several different ways of striking them?

6 A. Yeah.

7 Q. In the case, in the trial, was there testimony that the

8 defendant had struck the deceased with a butt of a rifle?

A. Yes.

THE COURT: Counsel, the Court's going to make these determinations, and I wasn't, you know, on the first boat here nor the last either, –

MR. DEGEURIN: Yeah.

THE COURT: – and –

MR. DEGEURIN: Some things are not necessary for me to ask I suppose.

THE COURT: That striking with the butt of the rifle was long after the deceased was dead, and I just want to point that out. You're making a comparison of striking, killing somebody. The butt of the rifle happened after the deceased lay on the ground dead by all testimony.

MR. DEGEURIN: Yeah, I agree.

THE COURT: Since I'm the sole juror I just want to be sure as we go what's going to be fed into the machine.

MR. DEGEURIN: Right. I agree that that was the testimony, and I know that's you're finding. But the prosecution argued differently at their argument.

THE COURT: Well, the Court understood that they did. But the fact is still as the Court outlined.

MR. DEGEURIN: Okay. Thank you, Judge. I'll – Let me move on further.

THE COURT: Surely.

Q. (By Mr. DeGeurin) I had asked you about Mr. Grace –

A. Yes, sir.

Q. – and his Bible.

A. Yes.

Q. What can you recall about Mr. Grace and his Bible?

A. It was big. He had the biggest Bible.

Q. Yeah.

A. I don't know how to say it without getting into what happened.

Q. Well, just start telling in your own words, and then if

we –

A. Okay. I didn't want to say anything wrong. I was reading that out of her Bible. After I read it, I think one more person read out of hers. And kind of at the same time there was a bunch of conversations going on, little conversations, and – kind of like clicks I guess you would say. And he was back there – at first I thought he was

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talking to himself, but I think he was talking to Mr. Brenneisen. And this is what I recall, him being back there and reading out of a Bible, and then seeing us read out of a Bible and wanting to know what we were reading. So, I think he then started reading that one. But it wasn't – more or less too himself and to Mr. Brenneisen, not standing in front of a group reading it to everybody.

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Q. Reading out loud, but not – are you saying –

A. Not allowed enough to be the center of attention.

Q. Right. So, if you were speculating you would say his

audience wasn't necessarily the entire jury –

A. Yes.

Q. – but certainly a couple of people – at least Mr.

Brenneisen?

A. Maybe one or two more maybe. But he was over in the –

They smoked and so they sat by the window. And a lot of them

that didn't smoke we sat on the other side of the table to be

away from that.

Q. So he was reading passages at least to Brenneisen and

someone else, or whoever was by the window?

A. Maybe just Mr. Brenneisen, maybe Mr. Brenneisen and

somebody else.

THE COURT: Just to get the record so it will

reflect accurately, Mr. Brenneisen and the gentleman, Mr.

Grace, sat together in the jury box, and apparently they sat

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the same way in the jury room. I don't know that. But you say that they were over there –

A. At different points. Mr. Grace is what I call a wanderer. He doesn't stay still too long.

THE COURT: I understand.

A. He kind of makes the rounds.

MR. DEGEURIN: Yeah. I – Your Honor, I do know he sat next to Mr. Brenneisen a few times, but at one time I know for sure when he was reading the Bible during my argument he was sitting in other place.

THE COURT: That's fine.

MR. DEGEURIN: Okay.

Q. (By Mr. DeGeurin) Did you – you said someone else also read the, the highlighted portion that you read. Do you recall which juror that the book was handed to?

A. I think – I think. I couldn't say specifically, but I

think it was Mrs. Robinson, and I think she made the comment

that, oh yeah, she knew about that one, cause she – a lot of

the reason that Bibles were in there is where that after we

would get out here sometimes, like on Wednesday nights, you

know, Wednesday night church and stuff like that, they would

bring their Bibles and just leave here and go to there. And

that's why there were so many.

Q. Uh-huh.

MR. DEGEURIN: May I approach?

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THE COURT: Yes, of course.

Q. (By Mr. DeGeurin) I'm going to show you a version of the

Bible. Now this is a 1932 print so I'm not sure if this is

the actual one that you saw. But, I direct your attention

to, "And if he smite him with an instrument of iron so that

he die, he is a murderer; the murderer shall surely be put to

death." Now is that the passage that you saw highlighted by

Mrs. Matheny?

A. Written that way?

Q. Yes.

A. It was written more like you have it.

Q. In the Motion for New Trial?

A. In the Motion for New Trial. I think it was, what they

call American Standard or something in plainer words.

Q. All right.

MR. DEGEURIN: Judge, the rest of the witnesses

will go faster.

THE COURT: That's fine. I understand.

A. Here is the –

Q. There we go.

MR. DEGEURIN: Judge, I bet you could find it

faster than I can in here. This is the – is the only reason

I'm taking this time, Your Honor, is because one case said to

introduce the Bible. They suggested that that might be a

25 good way of doing it. And I was trying find the exact

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1 wording in another translation.

2 THE COURT: I understand.

3 MR. DEGEURIN: But I'm – In this particular

4 Bible I'm afraid that this one may be –

5 THE COURT: That will not carry the language of

6 the Bible he's described.

7 MR. DEGEURIN: Thank you, Judge. I realize

8 this is a gift to the Court back in '63.

9 THE COURT: It was.

10 MR. DEGEURIN: This one also talks about

11 smiting.

12 A. Oh, yeah.

13 Q. (By Mr. DeGeurin) But, there's no doubt in your mind

14 that the same section of the Bible, although worded

15 differently, is the one that you read?

16 A. I thought it was Ecclesiastes but that shows you how good

17 I remember stuff. But, yeah, I would say that was probably

the same one.

Q. All right. Now, did – when you saw them reading it at

the window you said he a had a bigger Bible?

A. Uh-huh.

Q. Was there some way to know that you ya'll were talking

about the same passages?

A. I want to say that we were, but Mr. Grace was known to go

on off and wander, like I said, and so I didn't hear all of

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what he was reading. But I could – you know how when you

hear something and you think it's what you're talking

about –

Q. Right.

A. – and so you just pass it off as, "Okay, that's what I'm

talking about too." And you look, but you never confirm that

that's what you were talking about. That's basically where I

was at.

Q. And when Mr. Grace was reading this to the other members,
whatever number they were, in addition to Brenneisen, it was
loud enough for those people to hear?
A. For who was around him?
Q. Yes.
A. I would think. He's got a pretty loud voice.
Q. Okay. And did you – do you recall, not what effect it
had, but any words he spoke about those sections of the Bible
he was reading?
A. I don't recall.
Q. Okay. Did – was there any discussion about Mr. – that
you recall, about Mr. Khristian Oliver not testifying?
A. No.
MR. COBB: Your Honor, that's not raised by the
Motion for New Trial. There's no basis –
THE COURT: Sustained.
MR. DEGEURIN: Oh, I believe it is raised.

MR. COBB: I don't – I didn't believe it was or I wouldn't have objected.

MR. DEGEURIN: Well, it's raised. I would ask to –

THE COURT: I did not find it when I read it.

MR. COBB: And I don't believe it is there.

THE COURT: If it's there I would be please for you to call it to my attention, but I have not any recollection of it being in the motion.

MR. DEGEURIN: Well, it's not – If it's not, it sure was meant to be, and – at least on a Bill – There's two, two or three jurors that will specifically just say what was done about the failure to testify.

THE COURT: No. That is not an issue that –

MR. DEGEURIN: Can I do it on a Bill then when they, so we won't have to come back when we get to them?

THE COURT: The Court's not here for the purpose of making Bills or developing the record for the case, and it's not going to participate. It's here to

ascertain and determine those matters that are pled. That's
all. Otherwise we're going on a fishing expedition and
that's not the purpose of it.
MR. DEGEURIN: I'll pass the witness.
THE COURT: You may have the witness.
MR. COBB: Thank you, Your Honor,

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CROSS EXAMINATION
(QUESTIONS BY MR. COBB)
Q. Mr. McHaney, you said that you read more than one passage
I think from the Bible.
A. Yes.
Q. Do you recall what the other passages were about?
A. Yes.
Q. Can you tell us?
A. One was about obeying the law of the land, –
Q. Okay.
A. – that there's a law of the land, and you must obey the
law of the land because God sets out the law of the land,

something like that. There was that one. There was surely

thou shalt not kill one was there, and one other that I can't

remember.

Q. So, your attention to those was also at the same time you

were reading silently to yourself?

A. Yes.

Q. And your entire focus was not upon the passage that Mr.

DeGeurin has set out in his Motion for New Trial?

A. Not entirely.

Q. How again did the Bibles come into the jury room?

A. I think the – the jury that ya'll selected us was a

pretty stout believers, some other – better than others, of

course. Like I don't usually take my Bible everywhere with

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me, but some of them do.

Q. And you understand –

MR. DEGEURIN: Excuse me, I don't think he

finished answering the question.

MR. COBB: I'm sorry if I cut you off.

A. And then some of them, like I said, were – they had

Bible study after the trial, or different days. If we got

through in time they would go on to their Bible studies.

Q. (By Mr. Cobb) Okay. I apologize. I didn't know you

weren't finished.

A. No. That's okay.

Q. You referred to the jury that was selected. In fact, in

the jury selection process your religious beliefs were

inquired into.

A. Yes.

Q. The – did anyone bring the Bible in other than jurors?

A. No.

Q. Did anyone from the outside, anyone not a member of the

jury in anyway suggest that you should refer to the Bible?

A. No.

Q. Did the Court in anyway suggest, state or imply that you

should consult any law other than the law in the Charge?

A. No.

Q. Did the jury from any source receive a suggestion that

you should abide by any law other than that set out by the

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Court's Charge?

A. No.

Q. Did any member of the juror to your knowledge – any

member of the jury to your knowledge make reference to any

law other than the law set out in the Court's Charge?

A. No.

Q. Did any juror in any way make reference to any evidence

other than the evidence that was properly admitted in court?

A. No.

Q. Did anyone state that scriptures were equal to law and

should be followed instead of the Court's Charge?

A. No.

Q. Did anyone say that the Bible was evidence about what you

should do in assessing punishment or guilt in this case?

A. No.

Q. Did anything come to the jury from any outside source

such as a bailiff, a witness, a prosecutor, or a defense

attorney, during the course of your deliberations?

A. No.

Q. Was any kind of outside influence brought to bear upon

the jury while you were deliberating?

A. No.

Q. Was any outside influence brought upon the jury during

anytime during your trial or during the time that you were

awaiting further evidence or any other time?

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A. No.

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Q. You saw the Motion for New Trial?

A. Yes.

Q. In the Motion for New Trial did you see there was a reference to Mr. Grace reading aloud from his Bible while in the jury box?

A. Yes.

Q. Did that occur?

A. Not to my knowledge.

Q. Did you ever sit next to Mr. Grace?

A. I think I sat maybe one away from him.

Q. Okay. And were you at all times that you were in the courtroom close enough that if Mr. Grace had been reading aloud you would have heard him?

A. Yes.

Q. Did you ever hear him read out anything allowed while the jury was in the courtroom?

A. In the courtroom, no.

Q. Did any juror other than Mr. Grace read aloud from the Bible while you were in the jury room?

A. No.

Q. And at that time I think you related details about how he was reading either to himself or maybe to a small group.

A. Yes.

Q. Is that the only incident of reading aloud that there was

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of the Bible during the jury deliberation that you know of?

A. From what I recall.

Q. Were references to passages in the Bible subject to a lot of discussion or to a passing discussion?

A. I would say passing.

Q. I don't want to ask you what your mental process was, but I want to ask you if you took those scriptures to be law or evidence in regard to the case.

A. No –

MR. DEGEURIN: – Your Honor, I would have to object to that. If we're going to abide by those rules that

you set out, what his mental process was after reading the
Bible –
THE COURT: Sustained. He's heretofore
testified they did not consider it as law. It was not
presented to them as law. They only followed the Charge of
the Court and the evidence they heard.
MR. COBB: That's what he meant to –
THE COURT: I understand, but just –
MR. COBB: – sum up together in one question.
Q. (By Mr. Cobb) Is that the way you took it?
A. Yes.
MR. COBB: Pass the witness.
REDIRECT EXAMINATION
(QUESTIONS BY MR. DEGEURIN)

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Q. Did anybody stop you all and say, anybody in jury room
stop you and say, "We should not be considering these
passages in the Bible"?
A. No.

Q. Okay. No one said, "This is – We ought to go – We ought to study only the Court's charge and not these passages from the Bible"?

A. No.

MR. DEGEURIN: Pass the witness.

THE COURT: Any further questions?

MR. COBB: No, Your Honor.

THE COURT: And the juror may step down. And you will be excused. You may return to your home or to your place of business. Thank you –

A. Thank you.

THE COURT: – for being here. You may bring in the next juror. Which juror do you want next?

MR. DEGEURIN: Mrs. Symmank.

MAXINE K. SYMMANK,

after having been duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

(QUESTIONS BY MR. DEGEURIN)

Q. While you were on your way out we were pronouncing your
name four different ways, Symmank, Smink. Tell me?

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A. Symmank.
Q. Symmank. Okay. It gives me some comfort that the court
reporter was not exactly right himself. I'm going to get
right to the point, Mrs. – During the deliberations were
there Bibles in the jury room?
A. There was one.
Q. Do you recall telling us that at one time there were
three or four of them going through, reading parts of the
Bible for guidance?
A. Three –
Q. You mean three or four reading the same Bible?
A. Yes.
Q. Oh, okay. Who were those people reading the same Bible?

A. I couldn't tell you that. I don't remember. It was just anybody that wanted to.

Q. Men or women?

A. Probably both.

Q. You don't recall?

A. I don't really remember exactly which ones.

Q. Do you feel like I'm doing something improper by asking you these questions?

A. No.

Q. Okay. The – you – You do recall talking to me before about this?

A. Uh-huh.

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Q. Do you recall telling me that the – what verses from Numbers and Romans were read?

A. I don't remember the exact verses, but I do remember talking to you about it, yeah, the – that it wasn't, I believe, it was Romans and Numbers. I don't remember exactly

what verses it was now. It's been sometime since then.

MR. COBB: Your Honor, I would object to the form of the question. He's asking her now if she remembers talking to him before. I object that he should be instead just asking her those questions now. Asking her what she remembers now, and then if she doesn't remember, or if see says something different, he can go through a different procedure to correct it or impeach her. But to ask her what she said the other day to him is not evidence that should be before the Court.

MR. DEGEURIN: May I be heard, Judge?

THE COURT: Yes.

MR. DEGEURIN: The juror and I spoke. And the atmosphere of our speaking was much different than it is today. The juror has been with the prosecution today, and I

think maybe before. The attitude has changed. I think
it's – we're in a hostile situation, where at one time it
was freely spoken about. Now the memory is less than
accurate. And – so I – give me some leeway, Your Honor,
A. Can I say one thing?

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Q. (By Mr. DeGeurin) Yes.
A. I believe, if I remember correctly, that in the telephone
conversation we had the first thing that I said was I really
didn't want talk about the case. Was that not correct?
Q. That's true. And you would not give an affidavit.
A. No. You never asked me to give an affidavit. I was
never asked to give an affidavit. But I mean, I just
remember that when you called I said that I would prefer not
to talk to you about the case or anything that – You know, I

was extremely upset. It was, you know, shortly after the
time. And I just didn't want to talk about it. And I still
don't like talking about it.
Q. I know. And I'm sorry that you're in the situation.
But, I would like for you to tell us and the Court what you
told me about the Bible, it being read, and what – and you
actually named them, what sections Numbers and Romans; isn't
that true?
A. I did probably name the chapters – I mean, you know, as
far as Numbers and Romans, but I couldn't remember the
verses.
Q. Okay.
A. I don't know. At that time maybe I remembered the
verses. I don't remember today.
Q. Yeah. Sometimes it's helpful to refresh your memory.
And you'll read –

A. Is this our conversation?

Q. No. No.

A. Okay.

Q. No. This is based upon the conversation –

A. Okay.

Q. – which was placed in a Motion for New Trial. And this – Read this section about, "If a man strikes someone with an iron object so that he dies, he is a murderer."

A. Uh-huh.

Q. "The murderer shall be put to death".

A. Uh-huh.

Q. And on and on.

A. Uh-huh.

Q. That's from Numbers, right?

A. Either Numbers or Romans. I don't remember exactly which one.

Q. All right. But that was the one that was being read in the jury room?

A. I believe it was. I'm not positive, but I believe it was.

Q. All right. And who read it first in your recollection, not names, but –

A. I know I read it to myself.

Q. Uh-huh. Have you talked with the prosecutor today about this?

A. About reading the Bible, –

Q. Yes.

A. – the verses?

Q. Uh-huh.

A. I know that we did ask if it was wrong to read the Bible in the room in there, because I guess that was the thing I didn't think we did anything wrong by, by, you know, each one us – I pulled the Bible, over to, and, you know, read that, and read other verses too. I mean, I can't tell all the verses, all the different areas –

Q. May I stop you one second?

A. Uh-huh.

Q. Did the prosecutor say that I said you done something wrong?

A. No. I just – by reading, you know, the appeal, it just, you know, I felt like, well, gosh, did we do something wrong? I guess that was it. Just – just from it –

Q. Who gave you a copy of the appeal? Do you know?

A. I don't know if I have a copy of the full thing. I do – I think I did get this from James.

Q. And when was that?

A. The first of this week I think, or – No. It was probably last week.

Q. Uh-huh. Did you speak with Mr. Cobb at all?

A. No, not until today.

Q. Okay. You spoke today?

A. Uh-huh.

Q. And did he ask you if you read to yourself?

A. No, he didn't ask me that.

Q. Okay. Now, do you deny telling me that the scriptures were read aloud, not necessarily that you read it aloud, but that it was read aloud at one point?

A. That's correct. It was read. But, I mean, I happen to be sitting by – I don't remember exactly who it was. I think it was one of the guys. And he was reading and I was looking over with him. But now at the other end of the table they were doing their thing too. So, I mean, it wasn't like we all had attention and – There were probably three or four conversations going on at the same time, which was about normal.

Q. And – but when it was read aloud do you remember who was reading it aloud?

A. I don't remember which one it was.

Q. Okay.

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A. Like I said, I think it was one of the guys, but – I'm terrible with all of their names. I'm sorry. And I don't remember if I – I might have told you when I talked to you. If I did, you know, you can refresh my memory, but I don't remember.

Q. Mr. Grace, Kenneth Grace –

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A. Now, he was the man with the cowboy boots?

Q. I think there were two with cowboy boots.

A. Was he the one that owned a Bible?

Q. You told me he did. I don't know.

A. I was guessing he – Okay. If he had the Bible – I don't know his name.

Q. All right.

A. The one with the cowboy boots.

Q. Okay.

A. He's the one that brought the Bible in. And I don't – I don't think he wrote – no, he didn't read from it. He

brought it in and put it on the table.

Q. Yeah.

A. I don't believe he was the one that read from it, no.

Q. And did you see the one that had been highlighted in pink

and was passed around?

A. The Bible that he had was the type that's highlighted in

different areas. I mean, some Bibles have like blocks in

them where it's – You know, he didn't go highlight it. It

was highlighted. You know, it's the way the Bible's

printed –

Q. Okay.

A. – with different colors all through it.

Q. If you'll listen real carefully, are you denying that you

said that Mr. Grace read Romans – Numbers and Romans aloud,

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whether he was reading it to everybody or a few people?

A. Yeah, I deny – that's not what I said.

MR. COBB: Your Honor, this is not proper impeachment. Mr. DeGeurin has some notes that he may have assumed things, and he may have had his notes prepared before he made the telephone conversations. He's not asking her direct questions about what occurred and then confronting her with something else she said. He's trying to testify from his notes about something that may or may not have be what she said. But it's her testimony that's important. It's not a proper method of impeachment. He should ask questions directly of the juror, and then ask her if she said something else before, but not go through all of this reading from his notes and referring to that, because it's as if he's testifying about something she had said, and that's not proper impeachment.

MR. DEGEURIN: Judge, I – I see what's going

on here. It's – for some reason the lady now feels like I

am accusing her of doing something wrong.

A. No, that's not correct. That's not correct. At the time

I talked to you I was extremely upset. You might have

confused something. I don't remember saying that. But I do

not that Mr. Grace, if he was the one with the cowboy boots,

he didn't read it.

MR. DEGEURIN: I'll pass this witness, Judge.

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THE COURT: Yes. You may have the witness on

behalf of the State

CROSS EXAMINATION

(QUESTIONS BY MR. COBB)

Q. You said that you read some other verses?

A. Myself. I mean, I read to myself. I didn't read aloud.

Q. Do you recall what the substance of those verses was?

A. No. I was just flipping through and reading. I mean,

you know, we were in there for some time.

Q. Did the Judge of this court in anyway suggest or say or imply that you should consider the Holy Bible to be evidence in the case?

A. No, sir, not that I know of.

Q. Did the Court in any way suggest that the Holy Bible should be considered as law to be applied instead of the law set out in the Charge?

A. No, sir.

Q. Did anyone else do any of those things?

A. No, sir.

Q. Did you receive any information or influence from anyone outside of the jury room?

A. No, sir.

Q. Were the deliberations in any way influenced by anyone other than just the discussion that's natural between the jurors?

MR. DEGEURIN: Excuse me, Your Honor. That's – that calls for a conclusion, and it goes into that area that you said we're not suppose to ask. Were they influenced – were you mental processes influenced by –

THE COURT: Indeed.

MR. COBB: May I rephrase the question, Your Honor?

THE COURT: You may.

Q. Did – not talking about the effect it had on your decision making, but instead the occurrence of discussion and so forth, was there any source of discussion in the jury room other than that exchange between the jurors?

A. No, sir.

Q. You naturally conversed together and discussed matters together as part of your deliberations?

A. That's correct.

Q. Did any of the jurors in any way suggest that the Holy

Bible should be considered as evidence in the trial?

A. No, sir.

Q. Did any of the jurors suggest in any way that the Holy

Bible or any passages therefrom should be considered as law

instead of the Court's Charge?

A. No, sir.

MR. COBB: Pass the witness.

THE COURT: And you may have the witness.

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REDIRECT EXAMINATION

(QUESTIONS BY MR. DEGEURIN)

Q. Did anybody stop you or Mr. Grace or the other people

that were looking at the Bible and say, "We should not

consider that, we should only consider the evidence at

trial"?

A. No, sir. I – I believe that – I mean, I know that when

I reading the Bible it was after we had already made our

decision or voted, I believe. I'm not positive. It was during the time we were waiting to come back into the court.

Q. Were there three or four people in the jury reading the Bible for guidance?

A. I'm not sure why they were reading it.

Q. I'm just asking you, using your words and see if you remember.

A. Well, I mean, myself I – I mean, it was a difficult decision to make, and just wanting peace of mind, I guess, for myself.

Q. You've identified this. You know, the Bible is very thick.

A. Uh-huh.

Q. And you identified this particular section, the one talking about the, if you strike somebody you should surely be put to death.

A. Uh-huh.

Q. Are you saying you were reading that particular section for your own comfort and guidance?

A. I did read that –

Q. Did someone –

A. – along with some others, yes.

Q. Did someone point that out to you, or did you decide that that would be relevant or helpful?

A. No. I – I don't remember exactly who had opened it up to that area.

Q. Someone had opened it up to that area?

A. Uh-huh. Yes. I don't remember who.

Q. And so that's how your attention was direct to that particular section?

A. Uh-huh. And that might have been – Like I said, there were two different chapters that were read – and we didn't real the whole chapters. There were just a few verses. But, I don't even know what I was going to say now. I'm sorry.

Q. All right. So, you read this portion that is –

A. Uh-huh.

Q. – set out in the Motion for New Trial, but you didn't read the entire chapter?

A. I don't remember reading the entire chapter, no.

Q. Okay.

MR. DEGEURIN: I pass the witness.

RECROSS EXAMINATION

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(QUESTIONS BY MR. COBB)

Q. When did you read that part of the Bible?

A. Myself?

Q. Yes.

A. I believe it was after we had already voted, and we were waiting to come back in. You know, it took awhile to get back into, everybody back into the courtroom. I don't even remember if it was during the guilty/not guilty, during the sentencing when it was, you know, the Bible was there. I

don't remember which part of it was.

Q. Okay.

A. During the deliberation, or whatever you want to call it.

MR. COBB: Pass the witness.

MR. DEGEURIN: No further questions.

THE COURT: Yes. And you may step down. If you will just remain with Mr. McHaney for just a few minutes and then we'll try to get you home on time.

MR. DEGEURIN: Mr. Rodney Rodrigues, Your Honor.

THE COURT: Yes.

I think I caught him where I want to be.

RODNEY W. RODRIGUES,

after having been duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

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(QUESTIONS BY MR. DEGEURIN

Q. Would you tell us your name, please.

A. Rodney Rodrigues.

Q. Mr. Rodrigues, cutting to the chase here – and I'm sorry

you had to wait all this time while we took one person at a

time. But you were a juror in this case, weren't you?

A. Yes.

Q. During the deliberations, guilt or innocence and

punishment, two different deliberations, was there a Bible

brought into the jury room?

A. Yes.

Q. And do you remember when it was first brought into the

jury room approximately?

A. No, not really.

Q. And who brought it in there?

A. I guess it was Neal.

Q. Neal. Would that be Mr. Grace?

A. Yeah.

Q. Okay. Were there other Bibles brought in there after

that?

A. Not that I'm really aware of.

Q. Okay. And were there passages referred to in the Bible?

A. There was.

Q. Let me show you one of the passages and ask if you recognize it, not by name but by content? It's the one, "If

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a man strikes someone with an iron object so that he dies, he's a murderer; the murderer shall be put to death. Or if anyone has a stone in his hand that could kill and he strikes someone so that he dies, he is a murderer; the murderer shall be put to death. Or if anyone has a wooden object in his hand that could kill and he hits someone so that he dies, he is a murderer; the murderer shall be put to death. The avenger of blood shall put the murderer to death; when he meets him, he shall put him to death. These are to be legal requirements for you throughout the generations to come,

wherever you live. Anyone who kills a person is to be put to

death as a murderer only on the testimony of witnesses". Is

that the – does refresh your memory as one of the sections

that you –

A. It could be. I'm not going to say that it is or it

ain't.

Q. Had some of that stuff in it?

A. To be honest with you, some of them read it. I didn't

read the Bible personally. I couldn't tell you if that was

the quote that was read or not.

Q. Okay. Who – who was reading the quotes; do you recall?

Not by name, but how many people were reading the Bible?

A. I couldn't tell you that. I just wasn't paying that much

attention to the ones that were reading the Bible, you know.

Q. I'm talking now about out loud.

A. I guess Neal was the only one I can really recall read something. Like I say, that might have been it and might not have been. I just – I couldn't say for sure.

Q. And did anybody – anybody in the jury room stop you all and say you shouldn't have a Bible here?

A. I don't think so.

Q. Did anybody say that we shouldn't be reading things that were not in evidence or considering things not in evidence?

A. I don't guess.

Q. You don't remember anybody stopping you and saying something like that?

A. No, I don't think so.

Q. And, of course, no one told you that the Bible should be used as the law, did they? You got no instructions either way concerning how to use the Bible verses, did you?

A. Correct.

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17 Q. Did you happen to overhear Mr. Grace in the – in the

18 jury box while he had his Bible –

19 A. No, I didn't.

20 Q. – whether or not – Okay. Do you know whether or not he

21 had his Bible with him in the jury box during argument?

22 A. I – I remember him carrying it out there once but I

23 couldn't tell you exactly when it was.

24 Q. Okay. Do you remember when it was that you heard the

25 people reading from the Bible in the jury room, whether it

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1 was guilt or innocence or whether it was punishment?

2 A. I'm not sure on which one it was.

3 MR. DEGEURIN: Your Honor, at this time I would

4 like to ask –

5 Q. (By Mr. DeGeurin) Was there discussion among the people

6 in the jury room about Mr. Khristian not –

7 MR. COBB: Objection, Your Honor.

A. – testifying?

THE COURT: Sustained.

MR. DEGEURIN: Can I do it on a Bill, Judge? I hate to call him back on –

THE COURT: No.

MR. DEGEURIN: No.

THE COURT: Just not pled. If it were pled and the Court didn't permit it, the Court would permit you to make a Bill, but it's not within the scope of the hearing.

Q. (By Mr. DeGeurin) What was – The reading of the Bible, not what effect did it have on you, but what was the purpose of it stated?

A. I guess just maybe make some of them feel a little bit better about the decision that they had to make or the decision that was made.

Q. All right. Do you recall if there was also read a section concerning the Lord giving the authority to make laws

25 to people, and that we should follow those laws, words to

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1 that effect?

2 A. Not that I recall.

3 Q. Okay.

4 MR. DEGEURIN: All right. I will pass the

5 witness. Thank you, Mr. Rodrigues.

6 THE COURT: You may have the witness.

7 MR. COBB: Thank you, Your Honor,

8 CROSS EXAMINATION

9 (QUESTIONS BY MR. COBB)

10 Q. Mr. Rodrigues, did the Judge of this court in any way

11 imply or suggest or say to the jury that they should consider

12 the Bible as evidence in the trial?

13 A. No, sir.

14 Q. Did the Court in any way suggest or imply or say that you

15 should consider the Holy Bible as law to apply instead of the

16 instructions and Charge of the Court?

17 A. No, sir.

18 Q. Did anybody in the jury room do that –

19 A. No.

20 Q. – as to either aspect?

21 A. No, sir.

22 Q. Nobody said this is evidence we need to consider?

23 A. No.

24 Q. Nobody took it at that?

25 A. No, sir.

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1 Q. Nobody said this is the law handed down by Moses, or to

2 Moses and we have to follow it?

3 A. Not that I know of.

4 Q. Did anyone other than the jurors in any way influence you

5 by evidence or law, such as the bailiff, the prosecutor, or

6 the defense attorneys during the time you were deliberating?

7 A. No, sir.

8 Q. No additional evidence or information came into the jury

9 room from any source other than through the evidence, the law

10 given by the Court, and the arguments of the lawyers?

A. That's correct.

Q. Nobody in the jury itself said that I know something additional about the evidence or I know something more about the law?

A. No, sir.

Q. Was there any kind of pressure from an outside source that was applied unduly against any of the jurors that you know of?

A. Not that I know of.

Q. Did anything occur to your knowledge that would have caused the jury to have acted other than by the law provided by the Court and the evidence admitted during the courtroom during the court trial?

MR. DEGEURIN: Well, now – I cautioned – That sure opens the door.

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THE COURT: Sustained as it is presently phrased, but he may rephrase the question.

MR. COBB: Thank you, Your Honor.

Q. (By Mr. Cobb) I'm not the trying to ask you about what influenced your mind. I'm trying to ask if there was anything that came in from other source –

MR. DEGEURIN: Other than the Bible.

Q. (By Mr. Cobb) – other than what – Yeah, other than the Bible – was there any outside source of evidence or law that came before the jury during your deliberations?

A. No, sir.

Q. And other than what you've described about the Bible being in the jury room was there any other reference to the Bible or any other use of the Bible than you described?

A. No, sir.

MR. COBB: Pass the witness.

THE COURT: You may have the witness.

MR. DEGEURIN: Okay. I'm going to ask this question, Judge, and I know it's on the edge, and you stop me –

21 THE COURT: All right.

22 REDIRECT EXAMINATION

23 (QUESTIONS BY MR. DEGEURIN)

24 Q. Based upon what the prosecutor said, were there

25 discussions in the jury room that you should not use the

1 Bible?

2 A. Not that I can recall.

3 Q. Okay. Were there discussions in the jury room that you

4 should not refer to Mr. Khristian Oliver's refusal to

5 testify?

6 MR. COBB: Your Honor, I object –

7 THE COURT: Sustained.

8 MR. COBB: – I did not open the door to any

9 other matters.

10 Q. (By Mr. DeGeurin) Was there anything in the Charge that

11 you saw, that you recall, that told you not to refer to

12 sections in the Bible for guidance?

13 A. Run that by again.

Q. Was there anything in the Charge that told you not to refer to sections of the Bible for guidance in your decision?

MR. COBB: Your Honor, the Charge itself is part of the record in this case –

THE COURT: Sustained.

MR. COBB: – and that's the best evidence

MR. DEGEURIN: The Charge also says don't discuss whether or not he testified. I felt like he opened the door. If the Judge doesn't feel that way I'll back – I'll back away.

THE COURT: Yes. It has not been opened.

MR. DEGEURIN: All right. Thank you, Mr.

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Rodrigues.

THE COURT: And you may –

MR. COBB: No other questions.

THE COURT: Do you have further questions – you may step down and be seated with the other jurors.

And you may bring in the next juror.

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MR. DEGEURIN: Mrs. Glenda Webb, Your Honor.

THE COURT: Yes.

GLENDA M. WEBB,

after having been duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

(QUESTIONS BY MR. DEGEURIN)

Q. Mrs. Webb, during the deliberations, both on guilt and innocence and on punishment, was there a Bible brought into the jury room at anytime?

A. Yes, sir.

Q. And how many Bibles were in there?

A. I couldn't honestly answer. I know of one for sure.

Q. Did you ever see more than one?

A. There might have been more than one.

Q. And I'm asking these questions very carefully because we're restricted on what we can ask. Was – did you see anybody reading sections from the Bible?

25 A. Yes.

1 Q. Okay. And did you – And were there two verses that were

2 read, one being Numbers and one being Romans, or sections of

3 those?

4 A. I can't answer to that because I wasn't aware of them

5 being outright read as far as what sections or what part of

6 the Bible was read.

7 Q. Okay. Certainly no one told you that the Bible should be

8 used as law as opposed to the Court's Charge?

9 A. No.

10 Q. And no one told you that – on the other hand no one told

11 you that the Bible was not evidence and should not be

12 considered. Anybody tell you that? Is that too many

13 negatives? Let me rephrase it. Did anybody in the jury room

14 say, "Reading the Bible – The Bible is not in evidence and

it should not be considered as evidence"; anybody say that?

A. Nobody said that outright, but I felt like that that was

just kind of a given. Nobody considered it that way at all.

Q. Well, we can't go into what anybody else considered –

A. Okay.

Q. – or what you considered.

A. Okay.

Q. And – You know, because you don't really know what

someone else considered.

A. Right. I understand.

Q. Have you had a chance to talk to the other jurors –

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Don't tell me what they said. – like the ones that are here

today about the Bible verses that were read?

A. Yes.

Q. And talked back in the jury room today?

A. It wasn't really a focus. It wasn't really – it wasn't

really a focus what our conversation was. We talked about

trail rides.

Q. Well, let's hear about those. No, I'm just kidding. No

one – So, the – the Bible came in through the jurors and

not through somebody else?

A. Yes.

Q. Okay. The jurors actually, if there were more than one

Bible, brought them in themselves?

A. Yes.

Q. And the – referring to the sections of the Bible that

were referred to were done by the jurors during the

deliberations?

A. I wasn't aware of that. There were a couple of jurors

that did read the Bible. I was unaware of what section that

they were reading. It wasn't a center of focus –

Q. For you?

A. – for me.

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Q. Now, Mrs. Webb, was there a time that, that you had
agreed to sign an affidavit that there was a Bible in the
jury room and that there were verses read from it?

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A. Yes.
Q. And then you decided on your own not to do it later; is
that correct?
A. On my own I spoke with my father.
Q. Yeah. I just wanted to establish that you did tell me at
one time you would sign an affidavit for the purposes of, so
I could get to court.
A. That there – all I was aware of is that you wanted an
affidavit signed that there were that were – that there was
a Bible in the jury room.
Q. And that there were jurors that were reading the Bible?
A. Yes.
Q. Okay. All right.

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MR. DEGEURIN: I'll pass the witness, Judge.

THE COURT: You may have the witness.

MR. COBB: Thank you, Your Honor.

CROSS EXAMINATION

(QUESTIONS BY MR. COBB)

Q. Mrs. Webb, did the Judge of this court in any way suggest or imply or say to the jury that they should consider the Bible as any evidence in this trial?

A. No, sir.

Q. Did the Court in any way suggest or imply or state that you should consider any biblical passages as law to be applied instead of the Charge given by the Court?

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A. No.

Q. Did any of the jurors do either of those things?

A. No.

Q. Did anyone outside the jury, the bailiff, the lawyers, witnesses, bystanders, or anyone else other than the jurors,

do anything like that?

A. No.

Q. Did anyone outside of the jury apply any kind of pressure

for to you act one way or the other as jurors?

A. No, sir.

Q. No outside influence or undue influence from the jurors

was brought to bear on anyone in the jury room?

A. No.

Q. Did anyone in the jury room even state that the jury

could consider or should consider the Bible as evidence or

law to be applied in the case?

A. No, sir.

Q. Did anyone indicate that they felt that way?

A. No.

Q. Do you recall when discussions with the Bible might have

taken place or reading by individuals might have taken place?

A. I remember specifically, when we deliberated for the

punishment phase.

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24 Q. Okay. That was the time that the discussion was?

25 A. That I remember, that the Bible was read after we decided

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1 on the punishment phase.

2 Q. So, it was after the decision had been made?

3 A. Yes, sir.

4 Q. Was the Bible not the focus during the deliberations

5 about what the decision should be?

6 A. No, it never was.

7 MR. COBB: Pass the witness.

8 THE COURT: You may have the witness.

9 REDIRECT EXAMINATION

10 (QUESTIONS BY MR. DEGEURIN)

11 Q. When the Bible was first – when you were telling me

12 about when the Bible was first read, two verses were read, do

13 you recall what those the verses were?

14 A. No, sir, I don't.

15 Q. And I'm talking about after the decision, I'm talking

16 about during the deliberations?

A. No, sir, I don't.

Q. Okay.

MR. DEGEURIN: I'll pass the witness.

MR. COBB: No other questions.

THE COURT: Yes. The Court wishes to ask her one question, please. Any objection?

MR. COBB: Not from the State, Your Honor.

THE COURT: Simply about the Charge of the Court. It's not anything material.

MR. DEGEURIN: Okay, Judge.

THE COURT: That's all it is.

MR. COBB: No objection.

THE COURT: Ma'am, do you recall at the time that the evidence had all been finished and we had a long delay and then the Court read the Charge to the jury?

A. Yes.

THE COURT: And then you all had the charge with you in the jury room?

A. Yes.

THE COURT: And you all abided by that Charge,

did you not?

A. Yes, sir.

THE COURT: And do you recall near the end of that reading just above the Court's signature the following:

"In deliberating upon the cause you are not to refer to or discuss any matter or issue not in evidence before you, nor talk about this case to anyone not of your jury. And after the reading of this Charge you shall not separate from each other until you have reached a verdict"?

And, then reading in the next paragraph. "You are the exclusive judges of the facts proved of the credibility of the witnesses and the weight to be given to the testimony, but in you are bound to receive the law from the Court which is herein given you and be governed thereby." And you've

testified earlier that you followed that instruction?

A. Yes, sir.

THE COURT: I just wanted to clarify and put in the record what the jury was instructed. Thank you. Any further questions of this juror?

MR. COBB: Yes. I have one other question –

THE COURT: Yes.

MR. COBB: – about a matter that came up.

RECROSS EXAMINATION

(QUESTIONS BY MR. COBB)

Q. During the trial proceedings, including the arguments of the lawyers, you were present with the other jurors in the jury box?

A. Yes.

Q. At anytime did you hear any juror reading aloud from any material?

A. No.

MR. COBB: Pass the witness.

MR. DEGEURIN: No further questions.

THE COURT: There are no further questions and

you may step down and be seated with the other jurors,

please. You will be going home in just a few minutes.

MR. DEGEURIN: Your Honor, I need to testify

myself about a minute.

THE COURT: Well, isn't that highly unusual for

an attorney who tries the case to testify in the same?

MR. DEGEURIN: Well, Your Honor, I'm the one

that was standing there talking, arguing, while Mr. Grace was

reading aloud.

THE COURT: I understand.

MR. DEGEURIN: Now, whether any other jurors

heard it is not –

THE COURT: I understand. But there must have

been others who heard it, sir, and –

MR. DEGEURIN: Yes. Heather Petersen did.

THE COURT: Yes.

MR. DEGEURIN: She was here. And –

13 THE COURT: She's counsel in the case too.

14 MR. DEGEURIN: Yes. Well, that's the problem.

15 Mac and I talked about it –

16 THE COURT: It's a rule we followed here for

17 years because we understood that to be the rule, that if you

18 were counsel in the case you should not testify in the case.

19 MR. DEGEURIN: Unless you're the only one that

20 heard it, you know, and saw it. I mean, I –

21 THE COURT: I didn't know about that exception,

22 sir.

23 MR. DEGEURIN: Well, I know. But, you know,

24 you recall that the –

25 THE COURT: Oh, I'm aware of what you're

1 saying. Yes.

2 MR. DEGEURIN: And he was sitting right there.

3 And it was so disturbing because he was reading aloud while I

4 was arguing.

THE COURT: Twelve jurors sitting in the box with him. There were twelve jurors sitting in the box with him.

MR. DEGEURIN: That's correct. And they – Hopefully they were listening to me, and not be distracted.

And that's – and I – when I spoke with the jurors, Mr. Mike McHaney, for example, said I was listening to you. And I know he had a Bible, but I don't know if he was reading it.

THE COURT: There was also a large number of spectators in the courtroom. The courtroom was crowded, especially on the front rows, and that's not but a few feet from the jury box. But the Court – your theory that you're the only person could testify to it –

MR. DEGEURIN: That's the only one I found, Your Honor, other than Mrs. Peterson. She's in a capital case up in Fort Worth. And she's also co-counsel.

JERRY G. POOLE, OFFICIAL COURT REPORTER,
145th JUDICIAL DISTRICT

21 THE COURT: Well, counsel, –

22 MR. DEGEURIN: You know, for what it's worth

23 may I state it on the record, because I'm giving you my

24 honest –

25 THE COURT: I have no doubt –

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1 MR. DEGEURIN: You're not accusing me of lying.

2 I know that.

3 THE COURT: No, sir. Not at all. Not at all.

4 We're talking about technicalities, –

5 MR. DEGEURIN: Okay.

6 THE COURT: – Rules, procedures. But, of

7 course, when we talk about technicalities we need to recall

8 there was no objection made to any such conduct in this

9 courtroom, and you having practiced law here for eight weeks

10 consecutively, plus many hearings before and since, you must

11 recognize that this Court doesn't permit anything of that

12 nature. The Court itself would have stopped the proceedings.

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I'm just saying to you, sir, you didn't object to it.
MR. DEGEURIN: Oh.
THE COURT: And if you're saying that you didn't want to object in the presence and offend the juror, you knew you had a right to approach the bench and say to the Court, "There's a problem over here". But that was never done.
MR. DEGEURIN: Can you imagine, Judge, with a jury that was as sincere about their religious beliefs as this jury was, to stop in the middle of an argument and to ask that the Bible be taken away from one of the jurors?
THE COURT: No. That's not what the Court said. The Court said if this juror was reading aloud from

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the Bible during the time you were arguing your case, and this Court sat here in the Judge's bench, which is obviously

always near the jury box, and the Court didn't hear it, and you objected to it and the Court would have taken a recess and that probably would have remedied the entire.

MR. DEGEURIN: I'm not saying he was reading aloud like I'm speaking now. What was happening was, he was reading, his lips were moving, and it was every third or fourth word or so you could hear a word. So, he was reading to himself aloud, I guess is the better way of putting it. I didn't mean that the Court could hear it or anybody else.

But, when you're standing there arguing and you're trying to keep eye contact with each of the jurors and one of them is leaning down with a Bible open and reading it and his mouth is moving, that's what I was trying to get on the record.

THE COURT: I understand.

JERRY G. POOLE, OFFICIAL COURT REPORTER,
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MR. DEGEURIN: I wouldn't expect –

THE COURT: But had –

MR. DEGEURIN: – people to hear it other than to see the lips moving.

THE COURT: Had he been reading a novel could have been the same situation.

MR. DEGEURIN: Judge, I see a difference there.

THE COURT: I understand.

MR. DEGEURIN: I mean, the sensitiveness of it.

THE COURT: You feel that he was reading the passage which the jury later discovered or reviewed. I understand. I have no quarrel with you about that. It's just the issue was whether or not you be permitted to testify to it. And the Court had suggested that if it occurred there was a remedy, and that remedy was to object, even if it had to be at the bench without the juror ever knowing who said

what and just be a matter the Court could have handled it.

MR. DEGEURIN: You know, one thing I want to

point out, Judge, is in the case, the federal case that said

it was constitutional error to have the Bible in the

courtroom, and in the jury room, pointed out that there was

no objection by defense counsel. And they went on to explain

how, of course, he didn't object. You know that would have

been worse if he'd objected –

THE COURT: No doubt about that.

MR. DEGEURIN: – to the –

THE COURT: A good lawyer would have never done

that to a good juror. I realize that. But, the Court's just

pointing out to you that had that occurred the attorneys who

practice in this court would have surely in such a serious

case as this have taken it up with the Court, either then or

immediately after the jury argument was ended, or at some point. It was never brought to the attention of the Court.

MR. DEGEURIN: Your Honor – and I know you had

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a lot of cases –

THE COURT: – Yes, sir.

MR. DEGEURIN: – but there was a discussion, not on the record, about Mr. Grace and his Bible during argument. And I believe a comment was made by one of great authority in this courtroom that was so strange because he had said nothing in voir dire about being, being very routine in his religion. Does the court recall that?

THE COURT: I recall that he proved himself to be a man of deep conviction during the voir dire.

MR. DEGEURIN: And I believe that you – I believe that comment was made also. I – Just to the comment that it was never brought to the Court's attention, not

brought to the Court's attention in time to do something about it.

THE COURT: I understand. And I don't mean to be arguing with you at all. The issue was whether or not you could testify. And the Court ruled that you could not, and then we got into a discussion about you might have brought it to the attention of the Court at the time. And I understand your trial strategy. It was risky for you to have done that. I understand that.

MR. DEGEURIN: But it was not a secret from anybody in the courtroom that he had a Bible open and in his hands during final jury argument. Now maybe there's some

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issue about how loudly he was reading it, but I don't think there was any – I know the person of authority in this Court and I discussed it.

THE COURT: We can probably – we had many conferences and many pleasurable discussions about many things during the course of the trial. I don't recall. But, I'm just saying to you that anybody that knows the rules and procedures of this court know that the Court would not tolerate someone sitting in the jury box and reading aloud while someone was addressing the jury. No question about that. Not knowingly would it be permitted. If a person's reading to themselves that's their choice. But if they're reading aloud that's disturbing the court and it could not and would not be tolerated under any circumstances in this district court. Ask anyone who's tried it, or similar conduct.

MR. DEGEURIN: Your Honor, there was another

issue on the Motion for New Trial that stated, is about the
Motion for Change of Venue and Mistrial. And when I had
subpoenaed for the hearing that we were going to have before
things got to going so fast, I had subpoenaed the tape from
the television station.
THE COURT: Yes.
MR. DEGEURIN: And it was agreed at the time
that – we had let the television people go back – But I

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never got the tape in. And I want to introduce it now for
that.
THE COURT: What is it the nature of the tape? I'm sorry.
MR. DEGEURIN: You – let me refresh the
Court's memory. You recall that during a – after the
star – the chief witness testified –
THE COURT: Yes.
MR. DEGEURIN: – there was a – the

prosecutor, not Mr. Cobb, Mr. James had made a comment on TV that the credibility of their witness, started talking about the credibility of the witness. I filed a motion the next day for a mistrial and Change of Venue by virtue of what the comment and the violation of the rule that the Court had criticized me so severely for earlier –

THE COURT: Yes.

MR. DEGEURIN: – with affidavits that no longer could a person get a fair trial here in this community.

THE COURT: Yes.

MR. DEGEURIN: And the State filed counter affidavits from there investigators and some other people saying they thought they could get a fair trial. At that point was just about the time – by the time that it had come to a head for a hearing was about the time that the State was

resting, and all of a sudden we changed our time to where we started earlier and worked later, the defense.

THE COURT: Yes.

MR. DEGEURIN: And during that time we had subpoenaed – You also made the statement that we'd have no more hearings outside the presence of the jury. And so for a while there we were operating under that standard.

THE COURT: Yes. The Court –

MR. DEGEURIN: – It was during that time that the TV brought over this deal for the hearing, brought over the actual thing that was played to the public. And there was an agreement at that time between Mr. James and I that they didn't have to wait, they could leave this and there would be no –

THE COURT: You may complete the submission of your Bill heretofore filed in your motion by attaching

thereto and filing with the clerk the exhibit which you now have in your hand, being the tape recording of the interview on television.

MR. DEGEURIN: Thank you, Your Honor. And I don't recall the actual number it would be, but whatever the prosecutor and I – The court reporter will suggest –

THE COURT: He will assign a number to it, yes.

MR. DEGEURIN: All right.

THE COURT: That will be a part of your bill

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and your motion however it may be referred to. And it goes without saying, sir, the Court did not condone the remarks made on that date. And it's true that the Court had chastised you for remarks that you had made of a similar nature, and it did not did District Attorney. That's a matter that's of record. And I don't have an answer

for that. The matter that occurred in the first instance I recall that specifically and what the Court knew about it. And the second instance I had not actually seen the newscast and was not familiar with it and have not seen it yet. But I recall the allegations that you made in the matter. I was familiar with the other matter because I had seen it and read it or otherwise –

MR. DEGEURIN: And I believe my comment was, he's a good boy and his mother's a good woman.

THE COURT: That's right. Which constituted evidence clearly in the case of a substantial nature, and that's the reason why the Court took the issue up. But I'll say this, sir, this Court holds no ill will towards you. You've proven yourself to be a competent, experienced, courteous trial lawyer that we enjoyed having in this court.

JERRY G. POOLE, OFFICIAL COURT REPORTER,
145th JUDICIAL DISTRICT

MR. DEGEURIN: Thank you, Your Honor.
Let me make sure that covers everything.
THE COURT: Yes.
MR. DEGEURIN: I wish to introduce the actual

Motion for New Trial as an exhibit in the Motion for New
Trial because we were referred to it so many times during the
testimony.
THE COURT: You may do so.
MR. COBB: Your Honor, we'd object to that.
I'm sorry that I came after you've already ruled.
THE COURT: That's all right. I'll permit you
to be heard on the issue. What is the objection?
MR. COBB: My objection is, Your Honor, that
the motion contains verifications that are sworn only by the
two attorneys for the defendant, and that introduction of the
Motion for New Trial would not be proper because those are
sworn, that they might constitute evidence that goes to the
issues on the Motion for New Trial.

MR. DEGEURIN: In the alternative, Judge, I'll just, just the section of the portions that I have referred to.

THE COURT: The State'. Attorney's objection is well taken, and the Court sustains it. But counsel has resolved the matter, for the defense. He says he will simply withdraw that and offer only that portion of what the allegations were that are contained in the Bible readings.

MR. COBB: No objection.

THE COURT: And that is in evidence.

MR. COBB: We're talking about the scriptural

quotations?

MR. DEGEURIN: Yeah. What I will do is I will just blank out –

THE COURT: That's correct.

MR. DEGEURIN: – after Motion for New Trial, I'll blank out everything except the during deliberations the

juror with the scriptural thing, and then I'll blank out the rest.

THE COURT: That's nine.

MR. DEGEURIN: And we'll agree now that that is what we were referring to during the Motion for New Trial.

MR. COBB: But, Your Honor, the paragraph that says "during deliberations a juror who had brought his personal Bible to the jury room read the following passage from his Bible to the other jurors", that's a statement of fact so we don't need that.

MR. DEGEURIN: I'll take that out too. And I'll just – I just – just the section – We'll agree now section that is the quotation – We'll agree now that I'm introducing it as the same section that was referred during the –

THE COURT: One or more of the witnesses has

testified to that fact, and therefore, it could be admitted.

But if you have some objection to some portion of it – is

that what you're saying?

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MR. COBB: Not to the quotation.

THE COURT: No.

MR. COBB: Only to the statements which are

allegations in the Motion for New Trial, which by

introduction as an exhibit might become statements of fact.

THE COURT: Only the Biblical quotations are

being permitted to be filed as an exhibit.

MR. COBB: No objection.

THE COURT: Yes.

MR. DEGEURIN: And that will alleviate me from

introducing the Court's Bible or the –

THE COURT: That's correct. You may do that

this afternoon and leave it with the Court.

Now, any other matters before the Court to be resolved

before ruling upon this matter?

16 MR. COBB: None from the State, Your Honor.

17 THE COURT: Thank you.

18 MR. DEGEURIN: Your Honor, I would like make a

19 statement, probably not necessary, but by filing the Motion

20 for New Trial I did not intend by any means to limit the

21 errors that I had complained on during the trial and at the

22 end of State's evidence –

23 THE COURT: The Court is not so binding you,

24 no.

25 MR. DEGEURIN: Okay.

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1 THE COURT: It's only restricted you in what

2 was heard in this hearing.

3 MR. DEGEURIN: Thank you, Your Honor.

4 THE COURT: It does not effect your full right

5 of appeal.

6 MR. DEGEURIN: That's all I have.

7 THE COURT: Now, I want to move along because I

8 want to let these jurors get home and take care of matters,

but I want you to remain for just a moment until you see the ruling in the case so that you know and understand it. And that's the reason why the Court has asked you to remain here.

I have great respect for jurors. And I simply like for them to be informed. So in just a moment you will be going to your homes.

Now, anything further on the motion before the Court?

The only other remaining is the request for the providing of a record in the case for the defendant which we'll take up after we finish this matter. Any other argument to be heard?

The Court has heard the evidence and it's heard the statements made by the parties heretofore. I'd be pleased to here a very brief argument from either party. Movant desire to be heard?

MR. DEGEURIN: No, Your Honor.

24 THE COURT: Does the State desire to be heard?

25 MR. COBB: No, Your Honor.

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1 THE COURT: Thank you. And then the ruling of

2 this Court is, that having heard all the evidence pertaining

3 to the occurrence in the jury room in question in reference

4 to the Biblical quotation which is on file in the case, it is

5 the Judgment of this Court that the conduct of the jury was

6 not improper. And that a conscientious, dedicated and

7 carrying jury considered this case in accord with the Court's

8 Charge and the instructions of the Court and rendered their

9 verdict in accord with the evidence they heard in this case

10 uninfluenced by any outside influence of any kind shown to

11 the Court in this hearing. And, therefore, the Motion for

12 New Trial is overruled.

JERRY G. POOLE, OFFICIAL COURT REPORTER,
145th JUDICIAL DISTRICT

Anything further from either party in reference to this hearing? If not, let's move to the issue now of whether or not a record should be provided in the appeal of the case. So that everyone will understand, the defense has filed a motion asking that the court provide a record of the entire proceedings for the appellate record, which is a very expensive item. And the Court is simply considering that matter. And there is no supporting affidavits attached thereto. And the Court cannot consider it, or favorably consider it without there being some showing by someone as to the financial circumstances of the defendant.

MR. DEGEURIN: Your Honor, there is an affidavit by the defendant.

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THE COURT: Well, there may be, but that affidavit is very narrow. I'm talking about an affidavit

that explains where his pickup truck is. And I'm talking about an affidavit that explains whether or not he has any trust interests or inheritance from his grandfather, the first doctor in Waco to serve the needs of the people. And whether or not he has any assets of any kind from his family. His father's a very successful internationally known artist. And that doesn't mean that he's a wealthy man. He's working every day in post office, for which I admire him. For many people who don't know, and the jury probably doesn't know, that this family drove here each day from Waco, went back home and the father worked at night in the post office and drove back the next morning. So, it's certainly – You know, the Court is observant and aware, but seeing the pictures of

that beautiful home that this young man was raised in, the
compound as it was referred to, can't help but raise the
question why do we have to Texas – one of Texas' finest
attorneys trying this case, for which we're grateful –
Justice is never better than the quality of the people
participating, and you and the other fine attorneys have made
a great contribution. But it leases one to wonder, where are
we going here? Should Nacogdoches County have to pay for
this record? And you I know the record in this case is going
to amount to more thousands of dollars than any one of us can

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comprehend. And we just need to know what the facts are
about the family's ability to help.
Now, the Court's not unaware of the Dallas decision 15

years ago or thereabouts wherein the insurance executive paid for the entire representation of his son, just as we have here. And then following that came the appeal, and he refused to provide the record. And the Court clearly held that he had no responsibility. I'm not unaware of that decision at all. But here we are with a case, with the appeal of this case is going to be expensive. No question about that. And I admire the family for having employed you to appeal the case rather than asking for appointment in it.

MR. DEGEURIN: Which would save substantial amount of money to the –

THE COURT: Indeed it has. Just being fair with you and with the family. And their conduct has been exemplary here throughout the course of this trial. But the

Court just simply cannot just rule from this bench and say,
we grant you the record in this case. We need to know where
of we are. He owned the pickup truck according to the
testimony. The pickup truck was confiscated, and some of the
parts of it were taken for the evidence in the case. But it
must have had some value.
MR. DEGEURIN: Yeah, I – Of course, you can
have the truck if that's what the – if we – if it's even

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owned at this time. I think that would be complaining about
the mist while it's raining.
THE COURT: I think that's true. It's a rather
insignificant item, but I'm just –
MR. DEGEURIN: I'm not even sure the truck
actually belonged to him, and where it is today. I'll ask
him –
THE COURT: I understand. Those are things we

need to know.

MR. DEGEURIN: But I was going to suggest that given that if he still owned that used truck that –

THE COURT: We don't want the truck, sir.

MR. DEGEURIN: Okay.

THE COURT: We don't want it. It just appears to the Court though that if that truck, which was not more than a few years old, if it had a reasonable value of several thousand dollars surely that ought to be contributed to money value to Nacogdoches County if they provide the record.

MR. DEGEURIN: What's on file, Your Honor, is – I have no – affidavit from Mr. Oliver. "I have no current source of income. "I have no financial reserves in the form of bank accounts, saving accounts, certificates of deposits, or of any other financial instruments that I can draw upon to obtain cash for transcript costs. Further, I

have no real or personal property that I can sell in order to

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obtain the funds to pay for the transcripts of appeal. I certify that I am wholly without the financial resources to pay for the transcripts for my appeal." Now, this happened to be a form that was suggested by one of the – one of the courts of appeals or something.

THE COURT: I understand. It's a standard form.

MR. DEGEURIN: And I'm always reluctant to have someone in the delicate position of Mr. Oliver doing anything further or he'd be subject to cross examination by the State –

THE COURT: No.

MR. DEGEURIN: – when they didn't even object.

THE COURT: The Court is not suggesting that at

all.

MR. DEGEURIN: Oh.

THE COURT: But it appears to the Court that a parent could testify about whether or not this child has any inheritance coming to him, whether or not there are any trust provisions for him, or whether or not he owns some interest which is not yet vested. That's all. We just need to have the record clear. The Court has never denied anybody a record, sir. But no one has ever received one without first making a full revelation. That's all the Court's asking.

MR. DEGEURIN: Well, I would ask that – you

can inquire Mr. Oliver, but I don't want him to be cross examined by the State, especially since they have not even objected to the transcript.

THE COURT: I –

MR. DEGEURIN: I don't mind the Court inquiring.

THE COURT: I understand. But the Court does not want to make the inquiry. I would be very pleased for one of the parents to testify as to what they know about the assets of this young man.

MR. DEGEURIN: All right.

THE COURT: I do not wish to have him examined.

MR. DEGEURIN: All right. I'll call Mr. Oliver.

THE COURT: Come around, Mr. Oliver, please. Now, if there's any juror who has a commitment they need to make I'm going to excuse you at your convenience, otherwise you may stay. We're going to be recessing within ten minutes. I leave it to your good discretion.

KERMIT OLIVER,

after having been duly sworn by the Court, testified as follows:

DIRECT EXAMINATION

(QUESTIONS BY MR. DEGEURIN)

Q. Mr. Oliver, does your son, Khristian Oliver, own that

truck?

A. He is co-owner, but –

THE COURT: Just pull the microphone a little closer.

A. He's a co-signer. I own the truck. But he's a co-signer. We were trying to help him establish his credit.

And – but I – I'm part owner, the responsibility of the note is in my name.

Q. Are you the one that pays the –

A. Yes.

Q. – payments on it?

A. Yes.

Q. Do you know how many payments you have due to be paid on it?

A. The truck was purchased in '97, late '97. And he's been

in been, been detained for the whole, except for the first
month the truck was purchased, he's been detained here in the
legal system. And so he's not been able to maintain the
payments.
Q. So, have you been paying?
A. Yes.
Q. Who uses that truck?
A. Now, starting this summer my son's been going to summer
school, and he drives to Huntsville every day for classes.
But that's the only time it's used.

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Q. Is that Khristian you're –
A. Khristopher.
Q. Does Khristian Oliver own anything else?
A. No. No.
Q. Is – The Court had inquired earlier while you were in
the courtroom if he had some trust –
A. No.
Q. – anywhere. Does he have a trust?

A. No.
Q. Is there any inheritance from the doctor –
A. No.
Q. – to Khristian?
A. No.
Q. Does he have any ownership of the home –
A. No.
Q. – that the doctor left to his daughters?
A. No.
Q. In fact, the daughters of the doctor are, is not you or
your wife, is it?
A. No.
Q. All right.
THE COURT: I'd understood that during the
course of the trial.
MR. DEGEURIN: Did you?
THE COURT: I didn't understand fully, but it

was immaterial. I did grasp though that she was not.
Anything further?
MR. DEGEURIN: That's all, Judge.

JERRY G. POOLE, OFFICIAL COURT REPORTER,
145th JUDICIAL DISTRICT

THE COURT: And you may step down. Thank you.

THE WITNESS: Thank you.

THE COURT: The court finds that the defendant is in fact an indigent person and entitled to the record of the these proceedings notwithstanding the fact that he owns an insignificant interest in the pickup. It was issued out to he and his father jointly as co-owners, but the father has paid the bulk of all payments on the same. And it's now being used by the defendant's younger brother seeking an education. And the Court feels that the insignificant interest that the child has in it would not warrant a sale of the vehicle and salvaging it out at all. So, we leave that as it is, and we provide the record in the case. Motion is granted.

MR. DEGEURIN: Thank you, Your Honor.

JERRY G. POOLE, OFFICIAL COURT REPORTER,
145th JUDICIAL DISTRICT

19 THE COURT: Yes, sir. And you can contact the
20 court reporter as what you want in the record, of course, in
21 the usual course.
22 Anything else for the Court's records?
23 MR. COBB: Yes, Your Honor, just briefly. I
24 began to talk to Mr. DeGeurin during the recess about the
25 time, Your Honor, you came in and we didn't get to complete

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1 it. He may not have even understood what I was about to talk
2 to him about. But it is about the exhibits in the Khristian
3 Oliver case.
4 THE COURT: Uh-huh.
5 MR. COBB: I have prepared a motion today to
6 make an attached list to. The motion's ready but the list is
7 still being prepared. We can take that up on Monday. The
8 motion requests to allow the exhibits in the Khristian Oliver
9 case to be released only for use in the trial of the Sonya

Reed case.

THE COURT: Yes. That somehow came to my attention earlier that that matter was being desired. I don't recall. I think it's probably from the resident District Attorney's office. But it was made known to the court in some manner that they were seeking to work out something. And I had suggested that it be discussed with counsel for the defendant in this case since it's his appellate record. But certainly they will be needed, and they'll be well cared for, and they'll be available for the record in your case.

MR. DEGEURIN: I'll have to see which portions –

THE COURT: I understand.

MR. DEGEURIN: – he's asking for –

THE COURT: But the parties can continue to

work on that matter and present it to the Court at anytime.

Now, counsel will not be here on Monday. You suggested we might finish it in on Monday. This counsel will not be here at that time. You all can do it by mail or telephone or otherwise.

MR. DEGEURIN: I don't think we'll have a problem.

THE COURT: There won't be any problem. But now you have no objections to proceeding and using whatever is necessary when we convene and try this case next week, that is, that case next week.

MR. DEGEURIN: Now, I'm – I'm –

THE COURT: See, we're looking –

MR. DEGEURIN: – supposing they're not using any evidence that I put in.

THE COURT: No. We're talking about evidence that's on file with the clerk –

MR. DEGEURIN: Right.

THE COURT: – that has been offered by the

State in the prior case.
MR. DEGEURIN: That's right.
THE COURT: I just don't want to take you by surprise because we're probably going to be hearing testimony not later than Tuesday morning.
MR. DEGEURIN: I understand, Judge.

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THE COURT: And we'll proceed and hear it, and it will be well cared for. It will be in the care of the reporter. And meanwhile the exhibit list we prepared and so forth. And the Court will enter an order to the satisfaction of the two parties. I just don't want to find ourselves bogged down on Tuesday morning. We're going to proceed and utilize it, and I assume that's agreeable with you.
MR. DEGEURIN: It's agreeable. Of course, I don't want anything disturbed –
THE COURT: No. It will all be in its original

state. And it will all be within the control of this Court.

Be no problem about it. But I do want the parties to reach

whatever agreement you want in writing, and I will be happy

to enter it if you desire to have it done

MR. DEGEURIN: Thank you, Judge.

THE COURT: I assure you, your record will be

protected in its original state. Anything else now this

afternoon?

MR. COBB: Not from the State, Your Honor..

MR. DEGEURIN: No, Your Honor.

THE COURT: There's nothing further. I thank

the jurors for being here this afternoon one more time, and

thank you for remaining. I just like to always feel that you

are a part of this proceeding. And I think it would help to

bring some closure to this matter here today for you to be

here and hear the full proceedings. And I want to assure you

again that no one intended to offend you by bringing you here today. The telephone calls that you received were much lengthier than the Court ever anticipated them being. I have heard reports of how long they were. That's not in keeping with what the Court had in mind when it indicated to you at the end of the trial that it was not improper for you to be contacted, but the calls would be by the attorneys in person who tried the case, and the calls would be of a brief nature. Now, if any of you received a three hour telephone call I can only tell you that was not within what the Court's contemplation of the inquiry would be. Of course, sometimes these things get stretched when we're just getting oral reports. But I just hasten to point out to you that the

Court did not intend for any of you to be on the telephone for three hours. Were any you on the phone for a prolonged period of time? Was anybody on the phone for more than 30 minutes? How long were you on the phone?

JUROR WEBB: I believe about two hours.

THE COURT: How many?

JUROR WEBB: Two hours.

THE COURT: That's a long time.

MR. DEGEURIN: Your Honor, may I inquire if anybody complained about me calling any of the jurors?

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THE COURT: No. No one has made any complaint.

MR. DEGEURIN: Or the length that I talked to any of the jurors?

THE COURT: No. There have been no complaint. I'm just discussing that surely a juror must be taken by surprise when they get a two hour telephone call. I'm just

trying to make them feel good about the matter. That's all

MR. DEGEURIN: The only person that I'm aware

of and now aware of that is angry that I called is maybe Mrs.

Symmank.

THE COURT: Oh, I want to clarify that for you,

sir. Mrs. Symmank is a fine lady and goes to Shady Grove

Baptist Church, which is a great qualification for anybody,

has a fine father. And believe me she just feels so deeply

conscientious about this case, and until she's a little hurt

like anybody. I don't think she bears any ill will toward

you. She indicates over there in a very friendly manner she

bears none toward you, not at all. I assure you of that.

And that was the purpose in the Court addressing these

jurors, to tell them they were offended by the calls and sort

21 forth – and I didn't add, but I plan to, that an attorney

22 has duty to pursue his case whatever time it takes. And I

23 simply clarify that for the jurors so they don't feel like

24 something has happened. And the press is not present so

25 we're not airing this matter out for the public. We're just

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1 addressing the family once again, the jury. Anything else?

2 MR. COBB: Your Honor, I just had a thought

3 that might resolve this question about the exhibits. Of

4 course, I'd like to present a list to the Court to identify

5 those particular exhibits we want. I think that Mr. DeGeurin

6 indicated as long as it were, it was exhibits that were

7 offered buy State of Texas he would have no objection. If we

8 could just have that as an agreement on the record now, that

the defense has no objection to any of the State's exhibits from the Khristian Oliver trial being used in the Sonya Reed trial, provided they are kept in the custody of the District Clerk.

THE COURT: And in their original state and condition, or any requirement that may be had in the appeal of his case. The mere fact that you enter them in evidence here if he needs them for any reason he still has full access them.

MR. DEGEURIN: Thank you, Judge.

THE COURT: You understand and you agree to that, do you not?

MR. COBB: The State agrees.

THE COURT: It doesn't mean he can carry them home with them. Of course, neither one you could. But he has full access to them call upon the court reporter for them to see them, read them, or whatever you need.

MR. DEGEURIN: I agree with that, Your Honor.

THE COURT: That's fine. Thank you.

MR. COBB: I'll draft an order conforming to that.

THE COURT: Thank you. And the bailiff will adjourn the Court, please.

(Court adjourned)

JERRY G. POOLE, OFFICIAL COURT REPORTER,
145th JUDICIAL DISTRICT

CERTIFICATE

State of Texas *

County of Nacogdoches *

I, Jerry Poole, Official Court Reporter for the 145th Judicial District Court of Nacogdoches County, Texas, do hereby certify that the above and foregoing constitutes a true and correct transcription of all of the proceedings requested by counsel to be included in the Reporter's Record, all of which occurred in open court and were reported by me.

I hereby further certify that attached hereto are

JERRY G. POOLE, OFFICIAL COURT REPORTER,
145th JUDICIAL DISTRICT

true and correct copies of the exhibits offered by the respective parties during the hearing of said cause.

WITNESS my hand this the 13th day of November, 2008.

/s/ Jerry Poole
Jerry G. Poole
Official Court Reporter
145th Judicial District Court

Certificate #1020
Expires 12/31/2008

101 West Main Street
Nacogdoches, TX 75961

APPENDIX H

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. 73,837

KHRISTIAN OLIVER, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM NACOGDOCHES COUNTY

Holcomb, J. delivered the opinion of the Court, in which Keller, P.J., and Meyers, Womack, Johnson, Keasler, Hervey, and Cochran, JJ., joined. Price, J., joined the opinion of the Court except with respect to its discussion of error number six, and joined the judgment of the Court.

OPINION

Appellant was convicted in April 1999 of capital murder. Tex. Penal Code Ann. §19.03(a). Pursuant to the jury's answers to the special issues set forth in Texas Code of Criminal Procedure art. 37.071 §§2(b) and 2(e), the trial judge sentenced appellant to death. Article 37.071 §2(g).[1] Direct appeal to this Court is automatic. Article 37.071 §2(h). Appellant raises twenty-eight points of error. We affirm.

In his first point of error, appellant claims the evidence is insufficient to sustain his conviction because the accomplice testimony was not adequately corroborated. A review of the evidence is necessary.

Benardo "Bennie"[2] Rubalcaba, age 16, testified that he and his brother Lonny Rubalcaba, age 15, had known appellant for about two months when they spent several days with appellant during spring break 1998. According to Bennie, on Saturday March 14, 1998, Bennie, Lonny, appellant and appellant's girlfriend, Sonya Reed, had gone to a friend's deer lease in Rusk County to practice shooting guns. They practiced with a .12 gauge shotgun and a .22 revolver that was at the house on the deer lease. Appellant also practiced with his own .38 special revolver and a .380 chrome automatic pistol that he called "Silver." The four remained together through Tuesday, making

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[1] Unless otherwise indicated, all future references to Articles refer to the Texas Code of Criminal Procedure.

[2] "Bennie" is spelled "Benny" by both parties in their briefs, but we follow the spelling used in the record.

numerous jaunts in appellant's pick-up truck, including several trips up and down Camp Tonkawa Road. On the evening of Tuesday, March 17, 1998, they bought some alcohol in Nacogdoches and then "scoped out" a store called Larry's Country Boys because appellant wanted to "see what type of video surveillance" it had. When Lonny and Bennie objected to casing the store, the foursome bought some chips and left. After buying gas and heading out of town, they noticed a little store that looked like it had just closed for the evening. They could see a couple of people still inside. Appellant drove back and forth in front of the store about six times waiting for the occupants to leave so they could break in, but eventually he left when Lonny and Bennie objected again. At Sonya's suggestion they decided to go to a friend's house, off Camp Tonkawa Road. On the way, they passed Joe Collins' house. Appellant asked if the house looked occupied. They pulled in the driveway and appellant got out and knocked on the door. When no one answered, appellant returned to the truck and reported that the doors had padlocks. He drove back down the road a short distance, pulled off, and parked. He and Lonny went back to house with bolt cutters, appellant's .380 pistol, and a handful of bullets. Sonya and Bennie, who remained in the truck, saw two vehicles drive by. Then they saw Collins drive by and pull into the driveway. A few minutes later, they heard gunshots, followed by appellant's shouts for help. Bennie ran to the yard and saw Lonny attempting to bind his injured leg with a belt. As Bennie was helping Lonnie to the truck, he heard a "loud smacking sound" and turned to see appellant hitting Collins in the head with the butt of a rifle

three or four times. Appellant threw the rifle into the bed of the truck.

As they were driving away, appellant took the rifle from the back, and threw it out on the side of the road. He also threw a pistol out of the truck, but placed his silver .380 pistol in a tackle box. They drove to a hospital in Nacogdoches. Sonya told everyone to say that they were at "the farm" in Cushing when someone drove by and shot at Lonny. Bennie testified that he told the deputies at the hospital that the shooting took place at the farm in Cushing. Appellant, Bennie and Sonya drove to the sheriff's department to give written statements later that night. Bennie's written statement repeated the earlier report about the shooting at the farm. The next day, deputies picked Bennie up to ask him for more information. Bennie decided to tell the truth and gave a second written statement.

Lonny testified to essentially the same facts as Bennie regarding the events in the days and hours preceding the shooting. Lonny also testified to what occurred inside Collins' house. After appellant knocked on the door and received no answer, they went around to the back of the house. Appellant removed a screen from a window and tried unsuccessfully to open it. When Lonny told appellant he thought someone was inside the house, appellant picked up a potted plant and threw it through the window. The two went back to the front of the house, and appellant cut the padlock on the door with his bolt cutters. Upon entering, appellant told Lonny to start looking for guns. Lonny found a rifle in the bedroom and placed it on the couch in the living room, and also found a 30.30

rifle in another room. In the meantime, appellant unplugged a VCR and television and stacked them in the living room. When they heard a vehicle drive up, Lonny went into the kitchen, but decided against escaping through the kitchen window. Instead, he followed appellant to the back of the house. As appellant was attempting to open a back door, they heard someone enter the house and start cussing, yelling and screaming. As Collins entered the back room, Lonny heard a loud boom, felt a lot of pain, and his leg started bleeding. He fell down. Appellant pulled out his silver gun and ran back through the interior door. Lonny heard more loud booms. Appellant came back and helped Lonny out of the house and into the driveway where appellant yelled for the truck. Sonya and Bennie pulled into the driveway, and Bennie helped get Lonny into the truck. Lonny looked toward the house and saw Collins lying on the ground. Appellant had a rifle in his hand and was hitting Collins in the face with the butt of the rifle. Appellant then got in the truck and they drove off. When Lonny first woke up in the hospital the following day, some officers asked him for a statement. He started to tell them they had been at the farm in Cushing. The officers stopped him and said they knew what had happened and that he was under arrest and read him his rights. Lonny asked the officers to leave, and they did. He later decided to talk to the officers and tell them the truth. He gave a written statement.

Article 38.14 provides that "a conviction cannot be had upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the offense committed; and the corroboration is not sufficient if it merely shows the commission of the offense." In conducting a sufficiency review under the accomplice witness rule, the reviewing court must eliminate the accomplice Testimony from consideration, and then examine the remaining evidence to determine whether there is sufficient evidence that "tends to connect" the accused with the commission of the crime. *Solomon v. State,* 49 S.W.3d 356, 361 (Tex. Crim. App. 2001).

Appellant argues that only the accomplice witness testimony places the gun and the rifle in appellant's hands, rendering him responsible for Collins' death. He also argues that showing a connection with the underlying offense is not enough. Finally, he argues that nothing, apart from the accomplice testimony, shows that appellant is the one of the four who actually murdered Collins. But "a defendant's presence at the scene and participation in the underlying offense [is] sufficient to connect him to the capital murder for accomplice-witness rule purposes." *Id.* at 362; *see also McDuff v. State,* 939 S.W.2d 607, 612 (Tex. Crim. App.) (stating "[e]vidence that the defendant was in the company of the accomplice at or near the time or place of the offense is proper corroborating evidence"), *cert. denied,* 522 U.S. 844 (1997).

Ample non-accomplice evidence tended to connect appellant to this offense. The neighbors' sightings of a pickup truck similar to appellant's across from the Collins' house on the evening of the

offense around 8 p.m., coupled with the neighbor who heard the gunshots coming from Collins' house, together with the foursome's later arrival at the hospital at Nacogdoches, established their presence at the Collins' house on the evening of the offense. Further, DNA evidence showed Collins' blood on appellant's pants and on his boot. Experts testified the blood stains were both contact and impact or cast off stains, suggesting that appellant was at least in close proximity to Collins during the beating. This evidence "tends to connect" appellant to the offense. *See Trevino v. State,* 997 S.W.2d 849, 852 (Tex. Crim. App. 1999) (holding presence of appellant's blood on victim's panties and appellant's pant fibers on victim's clothes tended to connect appellant to crime); *Gosch v. State,* 829 S.W.2d 775, 782 (Tex. Crim. App. 1991) (holding non-accomplice evidence sufficient to "tend to connect" defendant where, among other evidence, defendant was arrested where police found clothes splattered with same blood type as that of victim), *cert. denied,* 509 U.S. 922 (1993). **Point of error one is overruled.**

In his second point of error, appellant claims the trial court erred by declining to personally conduct *voir dire* questioning designed to uncover possible racial bias, in violation of the Sixth Amendment. During individual *voir dire,* following the trial court's initial cursory examination of the first venireperson, the trial court passed her for questioning by the State. Appellant asked the trial court to personally question the first venireperson, as well as all other venirepersons, on the subject of racial bias. The trial court refused appellant's request stating that the parties would be allowed to

ask such question on their own. A similar exchange occurred with the next venireperson. Appellant claims the court's refusal to personally question the venirepersons on the issue of racial bias was constitutional error in violation of *Turner v. Murray*, 476 U.S. 28 (1986).

In *Turner*, the petitioner, a black man, was sentenced to death for the murder of a white person. *Id.* at 29. Prior to *voir dire*, the petitioner's counsel submitted a proposed list of questions to the trial judge, including a question on whether the race of the petitioner and the victim would prejudice their ability to render a fair and impartial verdict. *Id.* The trial judge declined to ask this question. *Id.* at 31.

The Supreme Court noted that "[b]ecause of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected."[3] *Id.* at 35. This risk was particularly serious in light of the finality of the death sentence. *Id.* at 35-36. Further, the Court stated that in *Turner*, the risk that such prejudice may have infected the sentencing trial was unacceptable in view of the ease with which it could have been minimized. *Id.* at 36.

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[3] Under Virginia law at that time, the Court noted that a Virginia jury must first find a defendant likely to commit future violent crimes or that his crime was "outrageously or wantonly vile, horrible or inhume in that it involved torture, depravity or mind or an aggravated battery to the victim." *Turner*, 476 U.S. at 34. Second, the jury was required to consider mitigating evidence offered by the defendant. Finally, even if the jury had found an aggravating factor, and irrespective of whether mitigating evidence was offered, the jury had discretion not to recommend the death sentence. *Id.*

Thus, "[b]y refusing to question prospective jurors on racial prejudice, the trial judge [in *Turner*] failed to adequately protect petitioner's constitutional right to an impartial jury." The Court accordingly held:

> a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias. The rule we propose is minimally intrusive; as in other cases involving special "circumstances," the trail judge retains discretion as to the form and number of questions on the subject, including the decision whether to question the venire individually or collectively. Also, a defendant cannot complain of the judge's failure to question the venire on racial prejudice unless the defendant has specifically requested such an inquiry.

Id. at 36-37. It was pointed out by Justice Powell in his dissenting opinion that under Virginia law, the trial judge bore the sole responsibility for conducting *voir dire* examination. *Id.* at 48 (Powell, J., dissenting). It was customary state practice, however, for the judge to permit the parties to submit proposed questions. *Id.*

Appellant argues that *Turner* "clearly places the burden on the trial court" to conduct questioning about racial bias. But the question before the Court in *Turner* was not on whom the burden shall fall. Under Virginia law, the burden was statutorily placed on the court to *voir dire* prospective jurors. The issue in *Turner* was whether a capital defendant in such circumstances was entitled to *voir dire*

should be conducted. *See State v. Richardson*, 467 S.E.2d 685, 791-92 (N.C.) (noting trial court followed *Turner* in allowing defense counsel wide latitude to question prospective jurors on issue of racial bias), *cert. denied*, 519 U.S. 890 (1996). The trial court in the instant case did not err by declining to personally conduct *voir dire* on the issue of racial bias.[4] **Point of error two is overruled.**

In his third and fourth points of error, appellant claims the trial court erred in denying appellant the right to question prospective jurors regarding lesser included offenses and punishment for lesser included offenses, including community supervision, in violation of the Sixth Amendment to the United States Constitution, and Article I, §10 of the Texas Constitution.

Prior to *voir dire*, appellant sought to ask questions about lesser-included offenses, including questions about punishments for lesser-included offenses, such as community supervision. The trial court disallowed the questions, observing:

> [T]he ultimate issue is that you can't have a lesser included offense in a capital murder case when the facts on the face show the commission of it. And once again I do not know what the evidence will be in this case. I only know what has been presented to the court at this point. But, from what the court

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[4] Article 35.17 provides that the trial court shall "propound to the entire panel of prospective jurors questions concerning the principles, as applicable to the case on trial, of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion." The parties thereafter may *voir dire* the prospective jurors individually.

> has heard of it there has been a burglary of a habitation, and while in progress, the owner of the property was killed, and therein is capital murder.

Later on during *voir dire*, the trial court changed its position and ruled that appellant could pursue this line of questioning. The trial court permitted the parties to re-examine jurors who had already been selected. Both parties re-examined and accepted them without objection. But appellant argues that the damage was already done by the trial court's initial ruling. He argues, "it is impossible to know what course voir dire actually would have taken if the questioning had been permitted all along. It cannot be assumed that the same people would have been selected if the error had been avoided at the onset." Appellant further argues the alleged error is constitutional because it prevented his counsel from conducting *voir dire* on an issue "applicable to the case," in order to intelligently exercise his peremptory strikes.

Appellant is correct that the trial court erred in denying him the right to question prospective jurors regarding lesser-included offenses and punishment for lesser-included offenses. *Santana v. State*, 714 S.W.2d 1, 10 (Tex. Crim. App. 1986) (noting well-established right for capital murder defendant to voir dire on lesser-included offense of murder and minimum range of punishment). However, such error is harmless when the lesser-included offense is not raised by the evidence at trial. *Id.* The lesser-included offense of murder was not raised in this case. *See* point of error sixteen, *infra* (rejecting claim of lesser-included offense of murder).

Therefore, any error in the trial court's ruling at *voir dire* was harmless. **Points of error three and four are overruled.**

In point of error five, appellant claims the trial court erred in denying him the right to question potential jurors regarding the minimum incarceration period on a life sentence in violation of the Sixth Amendment to the United States Constitution and Article I §10 of the Texas Constitution. Appellant claims this litigation infringed upon his right to intelligently exercise his peremptory strikes.

For offenses committed before September 1, 1999, we have consistently held that the trial court does not violate the United States Constitution or the Texas Constitution by refusing to instruct the jury in a capital murder case concerning parole laws because it was the law at that time that parole was not proper for consideration by the jury.[5] *Green v. State*, 934 S.W.2d 92, 106 (Tex. Crim. App. 1996), *cert. denied*, 520 U.S. 1200 (1997). Further, because parole was not a proper consideration for the jury, the court did not abuse its discretion in refusing to allow *voir dire* questioning on that issue. *Id.* **Appellant's fifth point of error is overruled.**

In his sixth point of error, appellant claims the trial court erred in admitting gruesome and excessively prejudicial photographs of the victim.

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[5] Senate Bill 39 amended article 37.071 to require that a parole instruction be given jurors in capital murder cases, effective September 1, 1999. Section 2 of Senate Bill 39 provided that the amendment was applicable only to offenses committed on or after September 1, 1999. Prior law continues to govern pre-September 1, 1999 offenses. Appellant committed the instant offense on March 17, 1998.

Appellant complains of the admission of State's Exhibits 19, 22, 23, and 24, claiming these photos were so gruesome that they served "no probative purpose" and operated only to inflame the jury. Exhibit 19, depicting the victim's body outside his home, was admitted during the testimony of Ronnie Coates, who found Collins' body on the morning after the offense. Coates described the injuries to Collins' face: "Dry blood on his face. Face all messed up. At first I thought maybe an animal might have been chewing on him." Coates agreed Exhibit 19 depicted the victim as he saw him on the morning he discovered the body.

The next day, during the testimony of Lieutenant Refugio Tony Jasso, the trial court admitted exhibits 22, 23, and 24. These were additional photos depicting the deceased, from different angles, also taken as he lay on the ground outside his home. Exhibits 23 and 24 were close-ups of the head and face from different sides. The State argued that the photos were necessary to a clear understanding of the evidence – to show the position of the victim's body, the wounds as they appeared to the medical examiner, the pattern of dried blood, and the blood splatter on the victim's clothing and surrounding area. The trial court ruled Exhibits 22, 23, and 24 admissible on the ground that any prejudicial effect did not substantially outweigh their probative value.

The trial court did not abuse its discretion in admitting the photographs. While the photos were gruesome, the injuries they depicted were gruesome. As pointed out by the State, the photos were necessary to show the nature and extent of the

deceased's injuries. *See, e.g., Jones v. State*, 982 S.W.2d 386, 394 (Tex. Crim. App. 1998) (concluding photograph at issue depicted no more than gruesome nature of injuries inflicted), *cert. denied*, 528 U.S. 985 (1999); *Long v. State*, 823 S.W.2d 259, 273 (Tex. Crim. App. 1991), *cert. denied*, 505 U.S. 1224 (1992) (concluding that probative value not substantially outweighed by prejudice where exhibits were admitted "gory" but that was nature of offense where victims were killed by "numerous chopping wounds" to victims' heads and faces with hatchet). **Point of error six is overruled.**

In point of error seven, Appellant claims the trial court erred in denying him a hearing on his "Motion for Mistrial and Change of Venue." Appellant claims that during the guilt or innocence phase of trial, a television reporter asked the district attorney how Bennie Rubalcaba could remember so many details and the prosecutor responded, "It's easy when you're telling the truth."[6] Appellant claims that a local television station reported the comment on the evening of April 6, 1999. Appellant's counsel called the broadcast to the attention of the trial court the following morning and stated that he intended to "request a hearing" on the matter when he had the tapes, probably by the next day. On April 8, 1999, appellant filed a "Motion for Mistrial and Change of Venue." At the end of the testimony on April 19, 1999, appellant brought his motion and the need for a hearing to the attention of the court. The

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[6] The prosecutor disputed this version before the trial court: "No, ma'am. The press was rapidly fire [sic] questions and the question was, "How can people remember so many details?" My answer was, "It's easy when whether [sic] they're telling the truth."

trial court responded that the appellant would be "heard fully on it at a later time." Appellant supplemented the motion later that day by filing two affidavits.

We could find no further reference to appellant's "Motion for Mistrial and Change of Venue" in the record until June 25, 1999, at the Hearing on Defendant's Motion for New Trial. While appellant complained that the trial court had refused to grant his "Motion for Mistrial and Change of Venue," appellant did not complain of the trial court's failure to hold a hearing on the matter.[7]

Although appellant initially asked for a hearing on his motion and the trial court told him he would be "heard fully at a later time," he nonetheless failed to preserve the alleged error. The proponent of a motion bears the burden of obtaining a ruling from the court and thereby preserving the record. TEX. R. APP. P. 33.1. In the same way, the proponent of a motion bears the burden of obtaining a hearing on his motion. Without a hearing, there might ultimately be no ruling on his motion. Appellant has failed to preserve error. TEX. R. APP. PROC. 33.1. **Point of error seven is overruled.**

In points of error eight, nine, ten, and eleven, appellant claims the trial court erred in excluding, at

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[7] In his written Motion for New Trial, appellant alleged that "the Court erred in refusing to grant the Defendant's Motion for Change of Venue and Mistrial." The written motion did not complain of the trial court's failure to hold a hearing. At the hearing on the motion for new trial, there was discussion about the admission of the television tape for purposes of perfecting the record on his venue and mistrial motion, but appellant did not request a hearing or refer to the fact that he did not get a hearing on his motion.

the guilt or innocence stage of trial, expert testimony concerning the effect of acute stress on state of mind. Appellant waived these objections, however, because he voluntarily withdrew the expert's testimony before the court ruled on his admissibility. *Cf. Matchett v. State*, S.W.2d 922, 938 (Tex. Crim. App. 1996) (holding defendant was estopped from complaining on appeal about jury instruction that he refused). **Points of error eight, nine, ten and eleven are overruled.**

In point of error twelve, appellant claims the trial court erred in failing to place Maria Rubalcaba under the Rule, denying appellant due process of law, compulsory process, and due course of the law. Appellant did not object on any of these grounds at trial. Appellant has not preserved error. TEX. R. APP. P. 33.1. **Point of error twelve is overruled.**

In points thirteen, fourteen, and fifteen, appellant claims the trial court erred in failing to submit his requested jury instructions on self-defense, defense of a third person, and the right to continue shooting in a defensive situation.

Penal Code § 9.31, *Self Defense*, provides in part:

> (a) Except as provided in Subsection (b), a person is justified in using force against another person when and to the degree he *reasonably believes* the force is *immediately necessary* to protect himself against the other's use or attempted use of unlawful force.
>
> (b) The use of force against another is not justified:

(1) in response to verbal provocation alone;

(2) to resist an arrest or search that the actor knows is being made by a peace officer, or by a person acting in a peace officer's presence and at his direction, even though the arrest or search is unlawful, unless the resistance is justified under Subsection (c);

(3) if the actor consented to the exact force used or attempted by the other;

(4) *if the actor provoked the other's use or attempted use of unlawful force*, unless:

(A) the actor abandons the encounter, or clearly communicates to the other his intent to do so reasonably believing he cannot safely abandon the encounter; and

(B) the other nevertheless continues or attempts to use unlawful force against the actor[.]

(Emphasis added).

While it might be argued that appellant reasonably believed a single shot was immediately necessary to act in self-defense, the evidence shows that appellant shot Collins a total of five times and then beat Collins' head and face repeatedly with a rifle butt as Collins lay on the ground. These actions far exceed what could be argued as "immediately necessary" for appellant to protect himself. In addition, subsection (b)(4) provides that self-defense is not available if "the actor provoked the other's use or attempted use of unlawful force." Appellant

provoked Collin's use of force by breaking into Collins' house at night and perpetrating a burglary.[8]

In addition, defense of a third person requires that the actor's actions be justified under Penal Code §§ 9.31 or 9.32, both of which require that the actor reasonably believe his actions be immediately necessary. TEX. PENAL CODE § 9.33. Finally, there is no recognized penal code defense or non-penal code defense called "the right to continue shooting in a defensive situation," but in light of the recognized penal defenses, any such defense would be likely to be limited to the amount of force the actor reasonably believed immediately necessary to protect himself. Appellant exceeded the amount of force he could have reasonably believed immediately necessary to protect himself. *See Riddle v. State*, 888 S.W.2d 1, 6 (Tex. Crim. App. 1994) (quoting *Werner v. State*, 711 S.W.2d 639, 644 (Tex. Crim. App. 1986), *cert. denied*, 514 U.S. 1068 (1995) (holding defendant not entitled to instruction on self-defense where defendant continued to strike victim up to fourteen times after initial blow). **Points of error thirteen, fourteen, and fifteen are overruled.**

In point of error sixteen, appellant claims the trial court erred in failing to instruct the jury at the guilt or innocence phase of trial on a lesser-included offense of felony murder as defined in Texas Penal Code § 19.02(b)(3). Appellant believes the issue of self-defense raised the lesser-included offense and urges us to manipulate the *Rousseau* test to

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[8] Arguably, Collins acted legally in defending his property under Penal Code § 9.42; however, we under the facts of the instant case, we need not make this determination.

accommodate his argument or to overrule *Rousseau v. State*, 855 S.W.2d 666, 673 (Tex. Crim. App.), *cert. denied*, 510 U.S. 919 (1993) (setting our test for determining lesser-included offense as (1) lesser-included offense must be included within proof necessary to establish offense charged, and (2) some evidence must exist in record that would permit jury rationally to find that if defendant is guilty, he is guilty only of lesser offense).

However, self-defense is a justification to conduct; *if*, appellant had been entitled to a self-defense charge and the jury had agreed with it, then appellant would have been absolved of all criminal responsibility, including all lesser-included offenses. He would have been no more guilty of felony murder than intentional murder. We decline appellant's invitation to overrule *Rousseau*. **Point of error sixteen is overruled.**

In point of error seventeen, appellant claims the evidence was legally insufficient to support the jury's finding of future dangerous. Appellant urges that his youth, his discharge from the Navy, and his relationship with and domination by an older woman, were all factors that demonstrated he would not be a future danger. He also claims the evidence of extraneous offenses offered by the State merely marked him "as a sneak thief."

At punishment the State presented evidence that appellant began committing burglaries about a year and a half before the instant offense. Brian Jones, appellant's long-time accomplice and cohort, testified to numerous burglaries he committed with appellant, including a residential burglary committed in September 1996 in which they stole

guns, an October 1996 burglary of the Heart of Texas Coliseum, two burglaries in June 1997 of Filling Station No. 7 (also known as Hilltop Grocery), a July 1997 burglary of a sporting goods store, a July 1997 burglary of a Little League concession stand, an August 1997 burglary of a coliseum and general exhibits building, and an October 1997 burglary of a community college fieldhouse. Jones continued describing several other burglaries and thefts committed by appellant and him, including the theft of a large fishing boat from Donn's Boat Sales. He testified that appellant used his bolt cutters at the Heart of Texas Coliseum burglary and that appellant always carried them with him.

During one incident when Jones and appellant were attempting a burglary at the Waco High School, they were caught by a security guard. Jones testified that when the guard took appellant inside, appellant hit the guard and they ran. The guard caught up to them near the car. Jones pulled appellant's gun, appellant fired the gun out of the window. The security guard testified that appellant had pulled the gun and pointed it at him across the car roof, and also armed and fired the gun at an approaching janitor. Jones testified that at a carjacking in Boskey Park in October 1997 appellant pulled a gun on a man in a parking lot and took his wallet and keys. The victim of the Boskey Park carjacking testified that the gunman had held a gun to his head, cocked it, and demanded his money and keys. Other witnesses corroborated Jones' testimony regarding the items stolen at the places Jones described. A friend of Lonny and Bennie's testified

that he was out with appellant, Sonya, and Lonny in appellant's truck on March 14, 1998, when appellant stopped at the store near Rusk. Appellant got out of the truck, looked around, got out his bolt cutters, cut the padlock on the door and went it. He came back with things from the store, and his silver .380 was visible in the back of his pants. Appellant's activities on the night of the instant offense reflect this same disregard for consequences and authority. Appellant was intent on committing a burglary. He had stopped and checked out a couple of stores before stopping at Collins' house.

In addition to the extraneous offense evidence, the facts of the instant offense were brutal. The victim received five gunshot wounds. At least two of the shots were fired while the victim lay on his back on the ground outside his house. Two were fired into his face, one at close range. Appellant then beat him in the face with the butt of a rifle, repeatedly, fracturing his skull severely and disfiguring his face nearly beyond recognition. Following the offense, appellant agreed with his accomplices to lie about what happened and he gave a false statement to authorities about Lonny's injuries. The prior extraneous offenses reflect an escalating pattern of criminal activity, and an increasing willingness to take risks, and a propensity for violence. Viewing the evidence in a light favorable to the verdict, the extraneous offense evidence and the facts of the offense are sufficient to support an affirmative finding that there is a probability that appellant would commit criminal acts of violence that would constitute a continuing threat to society. **Point of error seventeen is overruled.**

In his eighteenth point of error, appellant claims the degree of reliance on accomplice witness testimony, at both guilt or innocence and punishment in the instant case, renders the imposition of the death penalty unreliable to satisfy the Eighth Amendment. Appellant argues that satisfying the accomplice witness statute, Article 38.14, by meeting its corroboration requirement, does not address constitutional concerns that death calls for a heightened degree of reliability under the Eighth Amendment. Further, appellant argues Article 38.14, which at least provides some protection by requiring corroboration, doesn't even apply at the punishment phase where extraneous offense evidence was admitted through the testimony of accomplice witnesses.

Appellant does not cite any authority that the Eighth Amendment requires corroboration of accomplice witness testimony. Moreover, Article 38.14 has no constitutional basis. *See Cathey v. State,* 992 S.W.2d 460, 462-64 & n.4 (Tex. Crim. App. 1999) (recognizing accomplice witness rule statutorily imposed and not derived from federal or state constitution), *cert. denied,* 528 U.S. 1082 (2000). **Point of error eighteen is overruled.**

In his nineteenth point of error, appellant claims the trial court erred in failing to instruct the jury that the State had a burden of proof beyond a reasonable doubt on the mitigation issue, denying appellant due process of law. Appellant urges that this Court's holding in *Prystash v. State,* 3 S.W.3d 522, 535 (Tex. Crim. App. 1999), *cert. denied,* 529 U.S. 1102 (2000), that neither party bears a burden of proof on the mitigation issue, must be repudiated

in light of the United States Supreme Court's opinion in *Apprendi v. New Jersey,* 530, U.S. 466 (2000).

In *Apprendi,* the Supreme Court held that sentence enhancements based on judicial fact findings violated the Due Process Clause. Thus, the Court held, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond a reasonable doubt." *Id.* at 490. Appellant argues that the Texas mitigation issue is analogous to the New Jersey hate crime statute at issue in *Apprendi.* He claims that under *Apprendi* the State should bear the burden of proof beyond a reasonable doubt that the mitigation issue should be answered in the negative.

Apprendi is inapplicable to Article 37.071. *Apprendi* applies to facts that increase the penalty beyond the "prescribed statutory maximum." Under Article 37.071, the "prescribed statutory maximum" is fixed at death. There are no possible enhancements. A positive jury finding on the mitigation issue does not have the potential of increasing the penalty beyond the prescribed statutory maximum. It has the potential for *reducing* the prescribed statutory maximum to a sentence of life imprisonment. By the same token, a negative jury finding on the mitigation issue still does not increase the penalty beyond the prescribed statutory maximum.

Apprendi does not address allocation of the burden of proof. The focus in *Apprendi* was on who should be the factfinder for the sentence enhancement. *Apprendi* does not compel a repudiation of this Court's holding in *Prystash,* 3

S.W.2d at 535. **Appellant's nineteenth point of error is overruled.**

In point of error twenty, appellant represents the same claim he makes in point of error nineteen but bases it on the Due Course of Law provision of the Texas Constitution. However, appellant does not present any argument that the Texas due course of law provision should be construed to provide greater or broader protection than the federal provision. Rather, appellant argues the Texas Constitution provides "at least as much protection as the federal constitution." *Muniz v. State*, 851 S.W.2d 238, 251-52 (Tex. Crim. App.) (holding that failure to provide rationale for interpreting state constitution differently than federal constitution waived error on state ground), *cert. denied*, 510 U.S. 837 (1993). **Point of error twenty is overruled.**

In points of error twenty-one and twenty-two, appellant claims the trial court's failure to instruct on the minimum incarceration period for a life sentence denied appellant due process of law under the federal constitution and due course of law under the Texas Constitution. We have previously considered and rejected these arguments, and decline to reconsider our position. *See Colburn v. State*, 966 S.W.2d 511, 516-17 (Tex. Crim. App. 1998). **Points of error twenty-one and twenty-two are overruled.**

In points of error twenty-three and twenty-four, appellant claims the trial court failed to instruct the jury as to the minimum period of incarceration, in violation of the Eighth Amendment and Article I § 13 of the Texas Constitution. Appellant points out that the legislature amended Article 37.071 in 1999

to require an instruction on the minimum incarceration period upon request by the defendant in capital cases in which the offenses were committed on or after September 1, 1999. He views the amendment as evidence of the "evolving standards of decency" under the above-cited constitutional provisions, and argues the amended article should be applied retroactively despite its stated effective date. He does not cite any case law or discuss other authority in support of his argument that the amendment should be applied retroactively, despite its effective date. Appellant has not adequately briefed his argument. TEX. R. APP. P. 38.1. **Points of error twenty-three and twenty-four are overruled.**

In points of error twenty-five, twenty-six, and twenty-seven, appellant claims the jury derived additional legal guidance from the Bible, an outside source, in violation of the Fourteenth Amendment, the Eighth Amendment, and Article 36.13. He claims jurors might have been influenced by Bibles they brought into the jury room and referred to during judgment deliberations. The trial court held a hearing on appellant's motion for new trial at which appellant raised this issue.

Appellant called four jurors to testify at the hearing. The State objected to the testimony on the basis of Rule of Evidence 606(b),[9] but the trial court

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[9] Rule of Evidence 606(b) provides in part that

> Upon inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or to the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict ...

overruled the objection. The State does not complain of the trial court's ruling on appeal.

Appellant has not met his burden of showing outside influence. While there was testimony that at least one Bible was brought to the jury room and some passages were read by a few jurors, every juror who testified stated that neither the Court nor any other juror claimed that the Bible should be considered as law or evidence in the case. There was no testimony suggesting that it was discussed as part of or during any deliberations. Two of the jurors who had a recollection about the timing, testified that it was not read until after the jury's decision had been made and the jurors were waiting to return to the courtroom. None of the jurors testified that they relied on or consulted the Bible or any biblical passages in their deliberations. Appellant failed to prove the presence of a Bible in the jury room was outside influence that affected the jury's verdict in violation of Article 36.13. **Points of error twenty-five, twenty-six and twenty-seven are overruled.**

In point of error twenty-eight, appellant claims the cumulative effect of the trial court's errors were harmful or amounted to error. We have rejected such claims. *Chamberlain v. State,* 998 S.W.2d 230, 238 (Tex. Crim. App. 1999) (holding that non-errors may not in their cumulative effect amount to error), *cert. denied,* 528 U.S. 1082 (2000). **Point of error twenty-eight is overruled.**

However, a juror may testify: (1) whether any outside influence was brought to bear upon any juror . . . .

The judgment of the trial court is affirmed.

DELIVERED APRIL 17, 2002.

DO NOT PUBLISH

APPENDIX I

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NOS. 53,682-01 and 53,682-02

EX PARTE KHRISTIAN OLIVER

ON APPLICATION FOR WRIT OF HABEAS CORPUS FROM NACOGDOCHES COUNTY

Per Curiam

ORDER

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.071, TEX. CODE CRIM. PROC.

In April 1999, applicant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuant to Article 37.071, TEX. CODE CRIM. PROC., and the trial court, accordingly, set punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Oliver v. State*, No. 73,837 slip op. (Tex. Crim. App. April 17, 2002) (unpublished).

Applicant presents forty-seven allegations in his application in which he challenges the validity of his conviction and resulting sentence and also presents three preliminary objections to Article 11.071. The trial judge found applicant's preliminary objections

to Article 11.071 without merit. *Ex parte Davis*, 947 S.W.2d 216 (Tex. Crim. App. 1995). The trial judge entered findings of fact and conclusions of law and recommended that relief be denied.

This Court has reviewed the record with respect to the objections and allegations made by applicant. We adopt the trial judge's findings and conclusions. Based upon the trial judge's findings and conclusions and our own review, the relief sought is denied.

This Court has also reviewed a document entitled "Applicant's Objections to Disposition Without Evidentiary Hearing and Motion for Extension of Time to File Habeas Findings of Fact and Conclusions of Law." Because this document was filed after the deadline provided for an initial writ of habeas corpus, we conclude it is a subsequent application. *See* Art. 11.071. We further conclude that the document fails to meet one of the exceptions provided for in Section 5 of Article 11.071 and, thus, dismiss this subsequent application as an abuse of the writ.

IT IS SO ORDERED THIS THE 30TH DAY OF OCTOBER, 2002.

Do Not Publish

A True Copy
Attest:
Troy C. Bennett, Jr., Clerk
Court of Criminal Appeals of Texas

By: _____
Clerk

COURT OF CRIMINAL APPEALS
OF TEXAS

APPENDIX J

RECORDED INTERVIEW

OF

MICHAEL BRENNEISEN

(***) = (Indiscernible)

EXCEPTIONAL REPORTING SERVICES

Interview in process; Tapé of Michael Brenneisen

INTERVIEWER: ... So you can just face that.

So you're not – what is it?

MR. BRENNEISEN: The church that I'm with now is not

attached to a denomination, as such, vis-à-vis Catholic,

Methodist, Lutheran, and such as that. The church that we

belonged to at the time that occurred was First Assembly.

INTERVIEWER: I see.

MR. BRENNEISEN: Which is, in itself, a non-

denominational-type church but it's loosely affiliated with the

Assemblies of God structure.

INTERVIEWER: Uh-huh.

MR. BRENNEISEN: So – but they are free to teach

biblical structure and (indiscernible) in our teaching.

INTERVIEWER: You're a member of another church now?

MR. BRENNEISEN: Yes. We're a member of another
bible-structured church out in a little town called "Alto".
INTERVIEWER: Well, what (indiscernible) is "bible
structure". What's –
MR. BRENNEISEN: Well, the structure of the church is
basic Bible principles as taught by the word of God, the Bible.
INTERVIEWER: Uh-huh.
MR. BRENNENEISEN: As opposed to the infringement of
religious man-made rules and regulations being imposed in on
top of that. That's why they call it "Fundamental".

3

INTERVIEWER: Yeah.
MR. BRENNEISEN: Fundamental is just what the Bible
says: that is the law –
INTERVIEWER: Word-for-word.
MR. BRENNEISEN: Word-for-word.

INTERVIEWER: You believe in that.

MR. BRENNEISEN: Yes, I do.

INTERVIEWER: Okay.

MR. BRENNEISEN: And it's taken many, many years for

me to come to the position to believe that that works that way.

INTERVIEWER: Uh.

MR. BRENNEISEN: Very quick history of myself:

Born and raised in Missouri which is – I was

supposed to have been a priest.

INTERVIEWER: Uh-huh.

MR. BRENNEISEN: I was scheduled to be a priest.

INTERVIEWER: Uh-huh.

MR. BRENNEISEN: But that didn't – that didn't pan

out too well (laughs).

INTERVIEWER: Oh, no.

MR. BRENNEISEN: So, no. I was not priestly-type

material.

But anyway, I was born and raised Catholic.

INTERVIEWER: Uh-huh.

25 MR. BRENNEISEN: And non practicing Catholic. In

1 name only, that "What's your religion?" "It's Catholic".

2 After that, through marriage, went to Methodist

3 church for a while. We were not practicing there. It wasn't

4 until we came to Texas that we became affiliated with the

5 church and was touched by the Lord. He said, "This is where I

6 want you to be. This is where I want you to learn." And this

7 was a spiritual touch.

8 INTERVIEWER: Say more about what happened.

9 MR. BRENNEISEN: Well, we came in to town and my

10 sister-in-law was a member of First Assembly. She invited us

11 to go to church. We knew we felt in our hearts that we needed

12 to belong to a church of some kind. Didn't know where; didn't

know what. She invited us to come to church. When we walked through the door of that church. It was like walking into a warm family. Just – we just felt it touch us, both of us. And we said, "This is where we're supposed to be."

And in going into the church – and it was much like your experiences of last night at the revival. Hand-raisings and tongue-talking and healing and there was a lot of vibrancy – spiritual vibrancy going on at the time. And although it was very strange to us –

INTERVIEWER: Uh-huh.

MR. BRENNEISEN: – just like "I'm not sure I really want – understand this. I don't know if I want to continue

5

with it or not," but we let ourselves be open to it and to the

Holy Spirit's workings. And we found it such a immense

spiritual comfort, that nothing else had ever compared to.

Nothing else. You know, money, love, family. That one touch

with the Lord has such a peace and joy attached to it that is

just immeasurable. That's what it does to the spirit.

Everything else can go to pot. The world can go to pot.

Saddam can go crazy. It don't make any difference, as long as

that touch of the Lord is there.

That's my quick sermon.

INTERVIEWER: Yeah.

MR. BRENNEISEN: That's a very big sermon (laughs).

INTERVIEWER: But do you need to believe in the Bible

because of that?

MR. BRENNEISEN: Do you have to believe in the Bible

because of that? That's an excellent question. No, you don't.

The Bible supports it because the Bible is truth from page 1 to the last page if it's a good translation, okay? That supports the whole reason for the Lord. That's his written love letter to us. The Bible is. It's the how-to of living this life.

And that's my interpretation of it.

INTERVIEWER: Yeah.

MR. BRENNEISEN: There's no better handbook written to live and coexist with our fellow human beings than the Bible. If we followed the tenets of that, we would be a

society that would be much more capable of functioning together, no matter what the language barrier.

INTERVIEWER: So you believe in also in – I went to the Grace Bible Church.

MR. BRENNEISEN: Uh-huh.

INTERVIEWER: And I could see that they were – they

spend lot of time at least rising about the great rapture, the

second coming. And I wonder why they were so interested in

these parts of the Bible.

MR. BRENNEISEN: That is the one great promise of

fulfillment of life after this life. There are many cultures

that think that once this life is done here in this physical

body, you're either reincarnated as something or that's it;

there's nothing else.

The one great hope that the Bible gives us is that

there is life after this body and that life is to be with God

and with Jesus.

INTERVIEWER: Okay. But think all Christians believe

that? That all believe in the great rapture?

MR. BRENNEISEN: It is written no all really believe

it. Not all have been taught it. And once having been on that

side of non-stewardship from somebody and doing my own study,

my own personal individual study in the Bible –

INTERVIEWER: Yeah.

MR. BRENNEISEN: – then I can look and see the

continuity of God's word. And I've tried to prove it wrong.

If I find something that is unfamiliar with me, I've tried to

prove it wrong. I've never succeeded; not has anybody else.

You can't prove it wrong.

INTERVIEWER: A man obliged to follow all the – if

not advices but also rules in the Bible.

MR. BRENNEISEN: There are – yeah. There are rules

from the Old Testament, rules from the New Testament.

INTERVIEWER: Uh.

MR. BRENNEISEN: The New Testament way of living, in

some ways, is a lot more stringent in the Old Testament, the

old Jewish customs and the old Jewish rules, which was the

basics – the basics of the Jewish religion.

INTERVIEWER: Yes.

MR. BRENNEISEN: From the New Testament, from Jesus

Christ, as Messiah, on then the rules have changed.

considerably –

INTERVIEWER: Yeah. So to me –

MR. BRENNEISEN: – or enhance – enhanced. They've

been given meaning. Put it that way.

INTERVIEWER: So the Old Testament, the rules in the

Old Testament, it seems strange that that should be applied to

a modern society.

MR. BRENNEISEN: Well, Christ in his own words, he

said, "I did not come to do away with the law; I came to fulfil

it."

INTERVIEWER: Yeah.

MR. BRENNEISEN: That's his own words.

INTERVIEWWER: But okay. I'm just curious because I think it is – It is to me, at least, it's strange that laws were made for several thousand years ago for Jewish people living in the desert or something like that.

MR. BRENNEISEN: The desert, sure.

INTERVIEWER: Yeah. How could they apply to a modern society?

MR. BRENNEISEN: Good question. The laws, if you look at them as far as – and I haven't dwelt a lot on the Old Testament, the Jewish laws – most of those still find good place today in as thing as mundane as sanitation, food, how to prepare it. We have so messed up our food chain –

INTERVIEWER: (Laughs) Yeah, have.

MR. BRENNEISEN: (Laughs) Yes, we have. That we would do well to go back and revisit some of those things that

were said down there. They were known without reason and – in

the preparation of the foods. And the way we deal with

individuals. Speedy trial. Many of those things that we

consider arcane today, have good foundation unless we just

don't like it.

INTERVIEWER: Yeah. Yeah.

9

But how do you – how do you range the Bible,

compared to civil law? The Bible –

MR. BRENNEISEN: The Bible is –

INTERVIEWER: The Bible is more or less written by

God, isn't it?

MR. BRENNEISEN: Yes.

INTERVIEWER: And the civil law is written by man.

MR. BRENNEISEN: Written by man.

If you take civil law back to the common law, it's

Bible basic. Back to English common law.

INTERVIEWER: Yeah.

MR. BRENNEISEN: That's Bible basic right there.

That's all it comes – comes right out of scripture.

INTERVIEWER: Yes.

MR. BRENNEISEN: Only man –

INTERVIEWER: But the civil laws of today –

MR. BRENNEISEN; Only man has messed it up by adding

law onto law onto law.

INTERVIEWER: Yeah, for example, the Constitution.

MR. BRENNEISEN: And the interpretation of law.

INTERVIEWER: Yeah.

MR. BRENNEISEN: So it's –

INTERVIEWER: There are no cars, for example, so we

have to make law for traffic rules for traffic person.

MR. BRENNEISEN: Uh-huh. So that was the answer to

that.

INTERVIEWER: But how do you – do you recount the

Bible as everything else?

MR. BRENNEISEN: Uh-huh.

INTERVIEWER: This above civil law.

MR. BRENNEISEN: Yes. When – and this, again, is my study and my interpretation.

If civil law laws into conflict with biblical law –

INTERVIEWER: Yeah.

MR. BRENNEISEN: – foundational structure of it, not the petty nuances of the laws. But when the civil law comes into direct conflict with biblical law, the biblical law will be the one that prevails. And that's the way that I judge and I expect to be judged.

INTERVIEWER: Yeah?

MR. BRENNEISEN: But real short statement for that:

In this case that brought you in contact with me.

INTERVIEWER: Yes.

MR. BRENNEISEN: This was a – well it was a two-fold. It was against civil law; it was also against biblical law.

"Thou shalt not kill." So, you know, we took – after much
deliberation we took the stand on civil law and biblical
support. This was, are we doing the right thing for mankind or
are we doing the right thing in God's eyes. And that's the way
they came up with the verdict.

11

INTERVIEWER: How did you do that? I know you were
alone. And this woman, Glenda Webb, she was – she was brought
to tears and she was –
MR. BRENNEISEN: Yes.
INTERVIEWER: – alike a very mess, I can tell you.
And she – I think had a desire to talk about it.
MR. BRENNEISEN: Uh-huh.
INTERVIEWER: Because it has been such a haring
experience for her to go through, though she had – she talk

about – a lot about forgiving. And she couldn't forget it,

really. She could not.

MR. BRENNEISEN: I think unless somebody was

particularly callused, I think we all have had those thoughts,

still to today –

INTERVIEWER: Yeah.

MR. BRENNEISEN: – like, "Did we do right?" "Did we

follow," you know, "our hearts?" "Did we follow the letter of

the law?" "Did we – did we go too far?" "Did we – you

know, what – I think we all have those questions. I don't

want to be in that position again. I don't think I like

judging fellow man in that light, based on the evidence that

was put in front of us.

INTERVIEWER: But how do we use the Bible there?

You said what it was.

25 MR. BRENNEISEN: It was – well, I think the evidence

1 or the things th t led to using the Bible was not necessarily:

2 Was the man guilty or innocent, but in the judgment phase of

3 it. That was – you know, the real part of it. Should – at

4 least to my feeling – was that after all the evidences were

5 presented and we viewed it equally, that – that you know, we came

6 to determination, Yes, this man did kill somebody. Now, how to

7 judge?

8 We were given the list of judgment possibilities by

9 Judge Pierce (phonetic). And based on that, we made our

10 determinations of, how should this be judged? And what can we,

11 in our minds and in our spirits, reconcile? And it was through

12 the biblical principles, then, that we utilized that to say,

yes, this is the only way – the only way that we can bring down the judgment and our recommendation –

INTERVIEWER: So you discussed this.

MR. BRENNEISEN: Uh-huh.

INTERVIEWER: Mike DeGeurin says that it's a certain phrases or verses from the Bible you use; is that true?

MR. BRENNEISEN: They – there were a couple of phrases that were issued out but we weren't the ones that initiated it. He did. Mike DeGeurin is an interesting young fellow. You've got to watch exactly what he says. Pardon me.

INTERVIEWER: (Laughs) You don't like him.

MR. BRENNEISEN: Well, no he – turn that off a minute.

(Recorder turned off)

INTERVIEWER: Now it start again.

MR. BRENNEISEN: So –

INTERVIEWER: But how could you really do this? Use

the Bible there because if you –

MR. BRENNEISEN: Well, you know, since you called.

I've been thinking about that and I was looking up some

passages that we used and I can't remember which ones we

used –

INTERVIEWER: I see.

MR. BRENNEISEN: – I get support for – support for

or against. And we went both directions in our use of the

scripture. This is we went forgiveness and we also went and we

used judgment, you know. We studied our law to apply that

law –

INTERVIEWER; Uh-huh.

2—in that. So – and like they were saying earlier, does the

Old Testament laws and the New Testament laws apply to today's

society 2000 years later? Yes, they are still very valid. And they way we arrived at that in our studies and the scriptures that were used to support our findings on that were solid and substantial. And they're in any courtroom today.

INTERVIEWER: Uh-huh. So you had the Bible on the tables –

MR. BRENNEISEN: We brought one right in there with us.

INTERVIEWER: But –

MR. BRENNEISEN: They had one in the courtroom; why couldn't we have one.

INTERVIEWER: Sorry?

MR. BRENNEISEN: They had one in the courtroom - -

INTERVIEWER: I see.

MR. BRENNEISEN: – right by the witness bench.

INTERVIEWER: Yeah.

MR. BRENNEISEN: There's no reason why we couldn't
have one in the juror's room.
INTERVIEWER: No, no, no.
(Laughter)
But according to the Constitution here –
MR. BRENNEISEN: Uh-huh.
INTERVIEWER: – as far as I know, at least,
absolutely nothing should be above the civil law –
MR. BRENNEISEN: Well –
INTERVIEWER: – isn't' that right?
MR. BRENNEISEN: That depends – see, that's man
mucking it up. Do you understand that praise?
INTERVIEWER: Yes, I do.
MR. BRENNEISEN: Okay. The Constitution, I believe.
says "We, the people, under God –
INTERVIEWER: Uh-huh.

15

MR. BRENNEISEN: Somebody forgot that little part in
there: "Under God".
INTERVIEWER: Uh-huh.

MR. BRENNEISEN: Okay. And the civil law would like to take precedent, separate church and state and all that fall- da-rah (phonetic). I don't agree with it because the civil law is the foundation of God's law – not Christian law but God's law.

INTERVIEWER: But the civil law is written by man.

MR. BRENNEISEN: The civil law is written by man. And by in large, throughout all of the law, like I said earlier, if you search back to its roots you'll find that it's Christian law that produced that and the thought processes for that.

And I'm not a lawyer by any means.

INTERVIEWER: No, no, no, no. But here in the United States there is also the rule and the law that the states can't – shall not interfere in egregious affairs and also the

opposite way; isn't that correct?

MR. BRENNEISEN: Directly. That is the –

INTERVIEWER: And I don't know exactly where but I

know that this is –

MR. BRENNEISEN: (Indiscernible).

INTERVIEWER: – such a strict borderline between –

MR. BRENNEISEN: It's called "separation of church

16

and state".

INTERVIEWER: – separation of church and state, you

cannot put prayer in your schools, for example, because of

that.

MR. BRENNEISEN: Uh-huh.

INTERVIEWER: Do you agree with that?

MR. BRENNEISEN: No. No, I don't because, boy, that

opens a real bucket of worms there (laughs). I don't agree

with separation of church and state because the moral – I

believe that the moral teaching of church, to categorize it:

"Christianity," God's word, I believe that those moral

teachings have a great deal with how we lend ourselves to

social structure.

INTERVIEWER: Uh-huh.

MR. BRENNEISEN: And without those moral teachings.

we're lacking in how, socially, to react with each other.

That's Michael's view. I don't agree with separation of church

and state.

Now, there are times, just like any organization

versus organization, there is going to be disputes.

INTERVIEWER: But –

MR. BRENNEISEN: So we work them out.

INTERVIEWER: But there's a reason for separation

between –

MR. BRENNEISEN: Yes, there is.

INTERVIEWER: – church and state.

MR. BRENNEISEN: Yes, there is. There is a reason

for it. And more than one but primarily one person caused the

court suit and said, "We don't want prayer in our – I don't

want prayer in my school for my child." And made it a law for

the land. One person.

INTERVIEWER: I thought it was historically because

of –

MR. BRENNEISEN: Huh-uh.

INTERVIEWER: – what the first Americans had

experienced (indiscernible). That should never have the state

to interfere with their –

MR. BRENNEISEN: Well –

MR. BRENNEISEN: – with what they would believe in.

MR. BRENNEISEN: True state – that, in itself, is a

true statement. That is one of the reasons why this riffraff

17 came to America was to have the freedom to worship. And there

18 was the others – totally –

19 Hang on a moment.

20 MR. BRENNEISEN: – Henry – I forget who the king

21 was in England.

22 INTERVIEWER: It was a George but what's the –

23 MR. BRENNEISEN: George Henry.

24 INTERVIEWER: – Henry the VII.

25 MR. BRENNEISEN: Yeah.

18

1 Now my wife could tell you who's who in that. She

2 loves that kind of history.

3 INTERVIEWER: I see.

4 MR. BRENNEISEN: But they came here and that was one

5 of the dictates, as I understand it through history that they

6 wanted the freedom to worship.

7 INTERVIEWER: Yes, sure they wanted it. Totally

8 free.

MR. BRENNEISEN: Free in the way that they saw fit

and that was –

INTERVIEWER: No state, no king, no king should

impose their rules, their specific rules on them.

MR. BRENNEISEN: Uh-huh.

INTERVIEWER: But so – you support – I'm on another

topic now.

Are you a supporter of the death penalty?

MR. BRENNEISEN: Whew. Yes, after much

deliberation.

INTERVIEWER: Yeah.

MR. BRENNEISEN: Much discussion.

INTERVIEWER: Yeah.

MR. BRENNEISEN: Much evidence. And this case that

we were on is a good example of that with everything that we

had to work with. Now, if there were other things involved in

it, we weren't given the benefit of that information. But what

we were given to work with –

INTERVIEWER: Uh-huh.

MR. BRENNEISEN: – which seemed true and fair and

beyond a reasonable doubt this person acted hostily and

premeditated – keyword: premeditated. So yeah, I do.

Unilaterally, no. Not unilaterally. I think each

case has to operate on its own merits.

INTERVIEWER: Oh, yes, 'cause, again. But sentences,

not a death penalty on their own –

MR. BRENNEISEN: Do you mind if I smoke?

INTERVIEWER: No.

MR. BRENNEISEN: Does it bother you?

INTERVIEWER: Okay.

MR. BRENNEISEN: Does it bother you?

INTERVIEWER: Huh?

MR. BRENNEISEN: Does it bother you?

INTERVIEWER: No, no, of course not. No, no,

absolutely not. No, no. I like – I like the taste of

tobacco, I think, but I do not smoke myself but I like it so

that's okay.

MR. BRENNEISEN: Okay.

INTERVIEWER: But I think that when I read the

newspapers here and see sentences of 20, 30, 40, 50, 60

years –

MR. BRENNEISEN: Uh-huh. Lifetime.

INTERVIEWER: Sometimes 99 –

MR. BRENNEISEN: Dual lifetime.

INTERVIEWER: – life. Really, I don't know what is

the reason behind that.

MR. BRENNEISEN: I don't know either.

INTERVIEWER: You know, because that is – I can't

see the meaning, really I can't.

MR. BRENNEISEN: Lifetime incarceration, I do not

understand. That's a burden on me. I'm a taxpayer and it's a

burden on me. I am paying for this person.

INTERVIEWER: Uh-huh.

MR. BRENNEISEN: He may not be in a life luxury but

he has got a roof that doesn't leak; he's got three meals a day.

INTERVIEWER: Yeah.

MR. BRENNEISEN: I don't understand that. I don't even propose to understand –

INTERVIEWER: Okay.

MR. BRENNEISEN: – the logic in that.

INTERVIEWER: Uh-huh.

MR. BRENNEISEN: I think, back to the scripture again, the scriptures adhere to a quick and speedy trial. The trials that last on and on and on, two or three, four years, five years, 10 years, this person is still incarcerated and hadn't had the benefit of a final trial. That's not scripture.

Scriptural is a speedy, quick judgment.

INTERVIEWER: Scripture of a – you know, this is stated in the Bible.

MR. BRENNEISEN: Yeah. Sure is. Everything's covered in here some place. Everything's covered. I was just thinking about that the other day about there was a case on – I heard on the radio. I don't remember what it was now but the trial has been deferred until November and so, and it should have been handled now. Why? All the information is there. Handle it. Are we so overburdened in our courts? We're getting into a social area (laughs) now.

INTERVIEWER: I can't really give you an answer for that because I don't know anything about it.

MR. BRENNEISEN: Yeah, I know. This is worldwide. The same situation, generally, is worldwide about the trials and judgment and such, about how to handle men. Here, we get a lot of press along with a lot of newspaper. A lot of talk.

INTERVIEWER: But I'm more interested in – this

Busso (Phonetic) case that Jack Pierce said that this group of

jurors was a wonderful group of people.

MR. BRENNEISEN: Is that what he said?

INTERVIEWER: Yeah.

MR. BRENNEISEN: Ha. How about that.

INTERVIEWER: He was so – yeah, yes, he said it.

Really he did.

So you – how long time did it take?

MR. BRENNEISEN: About a month.

INTERVIEWER: A month?

MR. BRENNEISEN: Uh-huh.

INTERVIEWER: There in '99 was it.

MR. BRENNEISEN: Yeah.

INTERVIEWER: So you had to go down to the courthouse.

MR. BRENNEISEN: Every working day.

INTERVIEWER: Every working day.

MR. BRENNEISEN: Yeah.

INTERVIEWER: And sit there.

MR. BRENNEISEN: For a month. Very long time, very long time. And we sat – we were chosen. Well, it took about two weeks. It was about two weeks to select the jury panel among – out of, you know, it's 12 jurors among the peers. That's the way the law is written. Twelve of your peers will be the jury. There were some 150, 160 people that were –

INTERVIEWER: 250, I think.

MR. BRENNEISEN: 250 that were called and selected from those. And if none are selected, agreed to by both prosecution and defense, then they will call more so that it will go on indefinitely until the 12 are selected. I think it only took about two weeks to select the jurors. And both

23

DeGeurin and James agreed to this jury. And there was quite

in-depth questioning, including "do we believe in the death penalty?" That question was brought out as I recall. And my answer was the same then as it is now. If the case merit it, only on the case. I didn't say get a new rope and hang 'em high. You know, I thought that would be a little –

INTERVIEWER: (indiscernible) (laughs). But then you said how was the group as a group?

MR. BRENNEISEN: View us as a group. It was mixed male and female. It was mixed religious background. It was a group that I don't believe I think a person would be hard-pressed to bring 12 people together that had a diversity of background to bring a judgment on somebody. There was no bias. There was no racial or – bias. There was no chauvinistic bias, male/female. It was an extremely – I

can't think of the word that I'm looking for. We interacted
well together as far as discussing – discussing the questions
that we had and listening. We had a good foreman.
INTERVIEWER: (indiscernible) yeah.
MR. BRENNEISEN: It – just like any group of 12,
there are – there were some that said, "It's a done deal; I've
made my decision." Others said, "No, we're going to talk this
thing until I'm comfortable with it. " So we had all facets of
discussion in it. And this being the part of the country that
is the famed Bible Belt –

24

INTERVIEWER: I know. That's one of the reasons why
I am here.
MR. BRENNEISEN: We're very – not necessarily very
learned; but we are not unschooled in scripture. We are taught

the word through home or through church or both. Whereas other

parts of the country has had a lacking in that area.

I've been to other parts of the country. I think

I've (indiscernible). Then we came down here, my wife, and I,

just for that one tremendous benefit of being able to learn

more about the Bible. And I have since become a Sunday School

teacher.

INTERVIEWER: I see.

MR. BRENNEISEN: Good or worse. I've been selected to

do that. I've been in some ministries, local ministries, in

helping people through the church or personal. So these things

– progression of things that have happened actually since that

incident – I forgot what the question was now.

INTERVIEWER: Are jurors told that you should not use

the Bible in your considerations?

MR. BRENNEISEN: No. Were we?

21 INTERVIEWER: Yes. Wasn't there any kind of
22 teaching, guidance of you, from, for example, the judge?
23 MR. BRENNEISEN: No. No, not that I recall.
24 INTERVIEWER: I see.
25 MR. BRENNEISEN: And I do believe - and this is my

25

1 opinion, that if we were –
2 **(End of Side A) (Begin Side B; no overlap)**
3 – then I had no business being there. I would have
4 left the courtroom because that's the foundation I would use.
5 INTERVIEWER: I see. So it seems reasonable that you
6 also – but you were not the only one who brought that – may I
7 say "you brought the Bible into your deliberations??
8 MR. BRENNEISEN: Okay. No, there are – most of us
9 there, about 80 percent, brought scripture into the
10 deliberation as well as the solace from that scripture. "Are

we making the right decision?" "Is this the way the Lord would

decide this case?" This particular case, not unilaterally but

this particular case. Given the evidence, given everything

we've been presented.

INTERVIEWER: But it does say that you sat – you sat

there with your Bible reading aloud and saying, "Here, see this

can apply to this sentence and this doesn't apply to this –

MR. BRENNEISEN: We, as support for a couple of

questions – the question was back to, you know, I may have

said something or somebody else may have something like, "The

scripture says this, this and this." "Okay. Show me where

that's at." At that time we then opened the Bible and said,

"This is the scripture and we read it word-for-word."

INTERVIEWER: Before you reached your verdict.

25 MR. BRENNEISEN: Before. Long before we ever reached

26

1 a verdict. This was not support after the fact; this was –

2 this was during the deliberation phase, the discussion phase

3 inside. So it was – it had nothing to do with pre-judgment.

4 INTERVIEWER: No, no.

5 MR. BRENNEISEN: This was – I mean, it either bound

6 it or it didn't. There was no gray area in that.

7 INTERVIEWER: But no instance in the group of jurors

8 against the Bible that way?

9 MR. BRENNEISEN: No. Now, some were unlearned, not

10 as well taught in scripture as others were. There were some

11 mainstream religions represented there that had not had the

12 benefit of weekly – twice a week, three times a week, home-

13 study scripture teaching. And there were some that are your

go-to-church-three-days-a-week/every time-the door-are-open and
are extremely familiar with the Bible. Okay? Quote chapter
and verse from any book in there. I can't. I still have to
look it up (laughs).
So we had a good cross-section of that representation
also and I think that there were a lot of us that are familiar
with scripture and those that aren't that got a pretty good
education on today's application.
Going back to your question earlier, can those laws
of 2000-plus years ago apply to today? Yes, they can. Yes,
they can. Because the foundation of those laws take them out
of the desert setting and put them in today's desert setting.

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Still foundational sound.
INTERVIEWER: So you mean we live in the desert here.

MR. BRENNEISEN: Well, pardon the phrase. Don't we?

(Laugher)

INTERVIEWER: It doesn't matter. (indiscernible)

But the last day then you had – when you went into

this room alone, did you also use the Bible then back there?

MR. BRENNEISEN: Yeah – no, now, okay. Now, in the

courtroom setting, we did not.

INTERVIEWER: No, no. But when you were deliberating

alone?

MR. BRENNEISEN: Yeah. When we were deliberating in

the jury room, then yes. The Bible was present. We did use

it to lend support for or against the judgment call.

INTERVIEWER: Yes. Pronouncing that thing is okay.

MR. BRENNEISEN: We used the scripture to lend

support for or against particular views. And it wasn't a hunt

to support a verdict that came. There was a stretch for

the truth of the verdict that we would eventually agree on.

INTERVIEWER: Uh-huh. Huh.

MR. BRENNEISEN: Okay? So it was – it was looking

for: "Are we, in delivering this verdict. delivering a true

and righteous verdict?"

INTERVIEWER: Yeah.

MR. BRENNEISEN: And I think that was paramount in

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everybody's mind, like, "If this man does not deserve what

we're proposing, we don't want to do that." Real fundamentally

simple there. "We don't want to be railroaded by any one

person into a verdict." And there was a discussion among the

stronger of the jurors right down to the weaker of the jurors.

And until everybody was satisfied in what we were proposing

beyond their own reasonable shadow of a doubt, there was not

going to be any kind of decision made.

INTERVIEWER: Yeah.

MR. BRENNEISEN: So we – it was – it was a real

enlightening experience for me. And everything that I was

until that point in life: "What do I believe in?" "What is my

personal, social and Christian foundation?" Everything was

brought to bear and brought to test in that one month –

INTERVIEWER: Yeah.

MR. BRENNEISEN: – in making that decision. I have

slept well since then.

INTERVIEWER: You have?

MR. BRENNEISEN: Uh-huh. I still think – and I've

thought about it on occasion. And, you know, even as late –

as late as when you called – revisited that. Yet, I still

feel comfort in my own heart and spirit.

INTERVIEWER: I thank you very much because you talked to me about it because clearly I would have understood if you had said no. Because some of the jurors (indiscernible)

so I'm very grateful that you have said – agreed to talk to me about this

MR. BRENNEISEN: Well, it's been my pleasure.

INTERVIEWER: – what might be a haring experience.

Now I'll turn the tape recorder off.

(Interview concluded)

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ Toni Hudson — 5/4/05

Transcriber — Date

TONI HUDSON

FEDERALLY-CERTIFIED TRANSCRIBER

OK

Egon Clausen

EXCEPTIONAL REPORTING SERVICES

APPENDIX K

CAUSE NO. 7901-98-5

THE STATE OF TEXAS	§ IN THE 145TH JUDICIAL
VS.	§ DISTRICT COURT OF
KHRISTIAN OLIVER	§ NACOGDOCHES
	§ COUNTY, TEXAS

CHARGE OF THE COURT

LADIES AND GENTLEMENT OF THE JURY:

The Defendant, Khristian Oliver, stands charged by indictment with the offense of Capital Murder, alleged to have been committed in Nacogdoches County, Texas, on or about the 17th day of March, 1998. To this charge the defendant has pleaded not guilty. You are instructed that the law applicable to this case is as follows:

I.

A person commits the offense of Capital Murder if the person intentionally causes the death of an individual and the person intentionally commits the murder in the course of committing or attempting to commit Burglary of a Habitation.

A person commits the offense of Burglary of a Habitation if, without the effective consent of the owner, he enters a habitation and commits or attempts to commit a felony or theft.

A person commits theft if he unlawfully appropriates property with intent to deprive the owner of the property.

Appropriation of property is unlawful if it is without the owner's effective consent.

II.

"Attempt" means to commit an act with specific intent to commit an offense where the act committed amounts to more than mere preparation but fails to effect the commission of the offense intended.

"Individual" means a human being who has been born and is alive.

"Enter" means to intrude any part of the body.

"Consent" means assent in fact, whether express or apparent.

"Effective consent" includes consent by a person legally authorized to act for the owner.

"Owner" means a person who has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than the Defendant.

"Habitation" means a structure that is adapted for the overnight accommodation of persons.

III.

A person acts intentionally, or with intent, with respect to the result of his conduct when it is his conscious objective or desire to cause the result.

IV.

A conviction cannot be had upon the testimony of an accomplice unless the jury first believe that the accomplice's evidence is true and that it shows the defendant is guilty of the offense charged against him, and even then you cannot convict unless the accomplice's testimony is corroborated by other evidence tending to connect the defendant with the offense charged, and the corroboration is not sufficient if it merely shows the commission of the offense, but it must tend to connect the defendant with its commission. You are further instructed that Bennie Rubalcaba and Lonnie Rubalcaba cannot corroborate each other. Such corroborative evidence, if any, must be from some other source than said accomplices, Lonnie Rubalcaba and Bennie Rubalcaba, or either of them, as herein above charged.

You are charged that Lonnie Rubalcaba and Bennie Rubalcaba were accomplices as a matter of law if any offense was committed, and you are instructed that you cannot find the Defendant guilty upon the testimony of Lonnie Rubalcaba or Bennie Rubalcaba unless you first believe that the

testimony of Lonnie Rubalcaba or Bennie Rubalcaba is true and that it shows the Defendant is guilty as charged in the indictment; and even then you cannot convict the Defendant, Khristian Oliver, unless you further believe that there is other evidence in this case, outside the evidence of Lonnie Rubalcaba or Bennie Rubalcaba, tending to connect the Defendant with the commission of the offense charged in the indictment and then from all the evidence you must believe beyond a reasonable doubt that the Defendant is guilty.

V.

Now bearing in mind the foregoing instructions, if you believe from the evidence beyond a reasonable doubt, that the Defendant, Khristian Oliver, on or about the 17th day of March, 1998, in the County of Nacogdoches, and State of Texas, as alleged in the indictment, did then and there intentionally cause the death of an individual, namely, Joe Collins by shooting Joe Collins with a firearm, to-wit: a handgun, or striking Joe Collins with the stock of a rifle, and the defendant, Khristian Oliver, was then and there in the course of committing or attempting to commit the offense of Burglary of a Habitation of the said Joe Collins who was the owner of said habitation, you will find the defendant guilty of the offense of Capital Murder and so say by your verdict, but if you do not so believe, or if you have a reasonable doubt thereof, you will acquit the defendant and so say by your verdict "Not Guilty."

VI.

In a criminal case the law permits a defendant to testify in his own behalf but he is not compelled to do so, and the same law provides that the fact that a defendant does not testify shall not be considered as a circumstance against him. You will, therefore, not consider the fact that the defendant did not testify as a circumstance against him; and you will not in your retirement to consider you verdict allude to, comment on, or in any manner refer to the fact that the defendant has not testified.

VII.

In all criminal cases, the burden of proof is on the State. All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that a person has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to no inference of guilt at his trial. The law does not require a defendant to prove his innocence or produce any evidence at all. The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

The prosecution has the burden of proving the defendant guilty and it must do so by proving each and every element of the offense charged beyond a reasonable doubt and if it fails to do so, you must acquit the defendant.

It is not required that the prosecution prove guilt beyond all possible doubt; it is required that the prosecution's proof excludes all "reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs.

Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

In the event you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him and say by your verdict "Not Guilty".

"Element of an offense" means (a) the forbidden conduct; (b) the required culpability; and the required result (if any). "Conduct" means an act or omission and its accompanying mental state. "Required Culpability" means the mental state required by law such as intent. Now bearing in mind the foregoing instructions and definitions, if you find the State has failed to prove each element of the offense beyond a reasonable doubt or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict "Not Guilty".

You are charged that it is only from the witness stand that the jury is permitted to receive evidence regarding the case, or any witness therein, and no juror is permitted to communicate to any other juror anything he may have heard regarding the case or any witness therein, from any source other than the witness stand.

In deliberating on the cause you are not to refer to or discuss any matter or issue not in evidence before you; nor talk about this case to anyone not of your jury; and after the reading of this charge you shall not separate from each other until you have reached a verdict.

You are the exclusive judges of the facts proved, of the credibility of the witnesses and of the weight to be given to the testimony, but you are bound to receive the law from the court, which is herein given you, and be governed thereby.

After argument of counsel you will retire and select one of your members as your presiding juror. It is his or her duty to preside at your deliberations and to vote with you in arriving at a verdict. Your verdict must be unanimous, and after you have arrived at your verdict, you may use one of the forms attached hereto by having your presiding juror sign his or her name to the particular form that conforms to your verdict.

/s/ Jack Pierce
JUDGE PRESIDING

VERDICT FORMS

We, the jury, find the Defendant, Khristian Oliver, guilty of the offense of Capital Murder, as charged in the indictment.

/s/ Nick Stallworth
PRESIDING JUROR

We, the jury, find the Defendant, Khristian Oliver, not guilty.

_____
PRESIDING JUROR

APPENDIX L

CAUSE NO. 7901-98-5

THE STATE OF TEXAS	§ IN THE 145TH JUDICIAL
VS.	§ DISTRICT COURT OF
KHRISTIAN OLIVER	§ NACOGDOCHES
	§ COUNTY, TEXAS

CHARGE ON PUNISHMENT

LADIES AND GENTLEMENT OF THE JURY:

You have found the defendant guilty of the offense of Capital Murder. You are instructed that a sentence of life in the penitentiary or death is mandatory on conviction for Capital Murder. In order for the Court to assess the proper punishment, certain questions or issues are submitted to you. Before answering these issues you will consider the following instructions:

I.

In arriving at the answers to the issues submitted, it will not be proper for you to fix the same by lot, chance or any other method than by a full, fair and free exchange of the opinion of each individual juror.

II.

During your deliberations you will not consider or discuss any possible action of the Board of Pardon and Paroles or the Governor.

III.

In deliberating on Issue No. 1, the jury shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or circumstances of the offense that militates for or mitigates against the imposition of the death penalty.

IV.

The State has introduced evidence of extraneous crimes or bad acts other than the one charged in the indictment in this case. This evidence was admitted only for the purpose of assisting you, if it does, in determining the proper punishment for the offense for which you have found the defendant guilty. You cannot consider the testimony for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other acts, if any were committed.

V.

You are instructed that in answering Issue No. 1 the State has the burden to prove beyond a reasonable doubt that the answer should be "Yes."

The jury may not answer Issue No. 1 "Yes" unless the jury agrees unanimously on the answer.

VI.

You are instructed that in answering Issue No. 1 that the jury may not answer "No" unless ten or more jurors agree. The jurors need not agree on what particular evidence supports a negative answer. If any juror has a reasonable doubt as to his answer to this issue, the juror shall vote "No."

VII.

ISSUE NO. 1.

Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?

Answer "Yes" or "No."

Answer: Yes

VIII.

If the jury has answered Issue No. 1 in the affirmative, the jury will answer the following issue:

ISSUE NO. 2.

Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral

culpability of the defendant, that there is a sufficient mitigating circumstance or circumstances that a sentence of life imprisonment rather than a death sentence be imposed?

You are instructed that in answering this issue, you shall answer the issue "Yes" or "No." You may not answer the issue "No" unless the jury unanimously agree, and you may not answer the issue "Yes" unless ten or more jurors agree. The jury need not agree on what particular evidence supports an affirmative finding on this issue. The jury shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

Answer "Yes" or "No".

Answer: No

IX.

You are instructed that the defendant may testify in his own behalf if he elects to do so, but, if he chooses not to do so, that fact cannot be taken as a circumstance against him nor prejudice him in any way. The defendant has elected not to testify in this punishment phase of trial, and you are instructed that you cannot and must not refer to nor allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against the defendant.

X.

A "reasonable doubt" is a doubt based on reason and common sense after a careful and impartial consideration of all the evidence in the case. It is the kind of doubt that would make a reasonable person hesitate to act in the most important of his own affairs.

Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

XI.

After the reading of this charge, you shall not be permitted to separate from each other, nor shall you talk with anyone not of your jury. After argument of counsel, you will retire and consider your answer to the issues submitted to you. It is the duty of your presiding juror to preside in the jury room and vote with you on the answers to the issues submitted.

/s/ Jack Pierce
JUDGE PRESIDING

VERDICT OF THE JURY

We, the jury, having answered the foregoing issues, return the same into Court as our verdict.

/s/ Nick Stallworth
PRESIDING JUROR

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(5)

No. 08-833

FILED
MAR 20 2009
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

KHRISTIAN OLIVER, PETITIONER

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION
(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

In 1996, Congress revised federal law to restrict the authority of federal courts to grant habeas relief to prisoners challenging their state-court criminal convictions. Habeas relief, as a threshold matter, is now unavailable unless a petitioner can identify a constitutional defect in light of "clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. 2254(d)(1). Federal courts are now also ordered to defer to state-court factual findings absent any "clear and convincing" contrary evidence. 28 U.S.C. 2254(e)(1).

The questions presented are:

1. Whether a juror's consultation of the Bible during the sentencing phase of a capital case violates this Court's "clearly established" law, in light of the clear split of authority over whether this conduct even implicates a defendant's Sixth Amendment rights in the first place.

2. Whether a habeas petitioner alleging that a jury wrongly reviewed outside evidence must prove the evidence had a "substantial and injurious effect" on the verdict (the standard for collateral review), or must satisfy only a "presumptive prejudice" analysis (the standard for *direct* review), or must satisfy no standard at all, under a theory of an "irrebuttable presumption of prejudice" (never before recognized for this claim at any stage of review).

3. Whether the lower court's fact-bound application of Section 2254(e)(1)—deferring to a finding of historical fact that the jury was not influenced by a Bible that a handful of jurors read at some point during sentencing—was correct under the unique circumstances of this case.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

This case presents the unusual circumstance in which the existence of a clear split is precisely the reason to *deny* review. Respondent readily agrees that petitioner's main constitutional claim (under the Sixth Amendment) is both highly important and frequently recurring. But under the controlling AEDPA standards, the threshold question is not whether petition's constitutional claim is valid, but whether the claimed right was *clearly established by this Court* at the time of the state-court decision. See 28 U.S.C. 2254(d)(1). By refusing to engage the critical AEDPA framework, petitioner has presented the wrong question at the wrong time: if his constitutional claim was not clearly established, a federal court would be required to reject it on that basis alone—without any occasion or need to resolve the underlying constitutional issue.

It accordingly follows that petitioner himself has uncovered the most debilitating problem for his own petition. Since federal courts are statutorily forbidden from granting habeas relief in the absence of clearly established law, the very split petitioner has identified confirms that the law is anything but clearly established in this area. Indeed, the circuits are not simply divided over the availability of habeas relief, but at least one circuit has held that the conduct in question is not even *unconstitutional* in the first place. This claim is therefore not subject to redress in this collateral proceeding. Because the Court can resolve this petition without resolving the constitutional question it purports to present, the split should instead be addressed and resolved in a proper vehicle arising on *direct review*.

Nor are petitioner's other questions worthy of certiorari. Petitioner's request for the Court to reconsider the standard of review for "extrinsic evidence" claims is insubstantial and warrants no further review. Contrary to petitioner's contention, there is no circuit split on this question—presumably because this Court has already definitively resolved the issue in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993) (imposing the "substantial and injurious effect" standard). Petitioner has misread the single Eleventh Circuit decision that he believes conflicts with *Brecht*. That decision found the claim at issue procedurally defaulted, and then, without meaningful analysis, noted that the defendant could not satisfy *any* standard of harmless-error review. The circuit accordingly had no occasion to decide which standard should apply—and it certainly did not use that case as a vehicle to create an (unacknowledged) split while flouting this Court's controlling precedent.

Petitioner's final question presents only a fact-bound issue unworthy of review. The Fifth Circuit's deference to the state-court factual findings in this case operated exactly how Congress intended—and petitioner raises no meaningful legal question to undercut the circuit's (correct) analysis.

Because the only question warranting review is not adequately presented in this (collateral-proceeding) posture, the petition for a writ of certiorari should be denied.

STATEMENT

1. Under the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, Tit. I, 110 Stat.

1218, Congress strictly limited a federal court's power on habeas review to void state criminal convictions. Congress provided that a state-court decision can be set aside on collateral attack only if it is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. 2254(d)(1). Congress also commanded federal courts to defer to state-court factual findings absent "clear and convincing" conflicting evidence. 28 U.S.C. 2254(e)(1); see also 28 U.S.C. 2254(d)(2) (similarly insulating state-court factual determinations from challenge unless the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings"). These reforms collectively were designed to "curb the abuse of the statutory writ of habeas corpus" and to preserve the proper degree of deference for state-court determinations. H.R. Conf. Rep. No. 104-518, at 111 (1996).

2. Petitioner murdered Joe Collins on March 17, 1998, during an armed burglary of Collins's house. Pet. App. 263a. Collins had arrived home during the burglary and confronted petitioner and an accomplice. After Collins shot the accomplice in the leg, petitioner pursued Collins, shooting him five times—including at least twice in the face—and continuing to "beat[]" Collins with the butt of his rifle as Collins lay on his back. *Id.* at 267a, 277a. The beating (described as "brutal") had severely "fractur[ed]" Collins skull and "disfigur[ed] his face nearly beyond recognition." *Id.* at 281a. Photographs of the attack depicted injuries so "gruesome" that petitioner moved at trial to have the pictures excluded from evidence. Pet. App. 272a-273a.

This murder and petitioner's subsequent arrest were the culmination of an 18-month "crime spree" that included multiple armed robberies, a car-jacking (where petitioner was found to have pointed a cocked gun at the victim's head), and a violent encounter with a security guard during an attempted burglary at a high school (where petitioner struck the guard, aimed a gun at him, and fired on an approaching janitor). Pet. App. 279a-281a. As the state court described it, the prior offenses "reflect[ed] an escalating pattern of criminal activity," "an increasing willingness to take risks," and "a propensity for violence." *Id.* at 281a.

3. A jury found petitioner guilty of capital murder and sentenced him to death. Pet. App. 2a-3a. Petitioner thereafter filed a motion for new trial based on the claim that some jurors had purportedly read passages of the Bible at some point during the sentencing deliberations. *Id.* at 2a-3a, 285a-286a.

The trial court held a hearing on the motion, and petitioner called four jurors to testify. Pet. App. 285a. The trial court instructed the jurors not to testify about their mental processes, but only to describe the objective circumstances of what occurred in the jury room. *Id.* at 129a-130a. The testimony revealed that a handful of jurors, individually or in small groups, had reviewed certain passages in the Bible before the sentencing verdict was read. *Id.* at 3a-5a, 285a-286a. One of those passages included a section that included the following statement: if a person "smite" someone "with an instrument of iron, so that he die, he is a murderer," and "the murderer shall surely be put to death." *Id.* at 3a.

The jurors also testified that no juror at any time suggested the Bible should be considered as law or evidence, and the Bible was never discussed "as part of or during" any group deliberations. Pet. App. 286a. Two jurors also recalled not reading the Bible until after the final vote was cast on sentencing and while the jurors were waiting to return to the courtroom. *Ibid.* Each juror also confirmed that they received and followed the instructions in the court's charge. *Ibid.*

At the conclusion of testimony, the trial court ruled that, in light of "all the evidence pertaining to the occurrence in the jury room in question in reference to the Biblical quotation," "the conduct of the jury was not improper." Pet. App. 234a. The court further ruled that "a conscientious, dedicated and carrying [sic] jury considered this case in accord with the Court's Charge and the instructions of the Court and rendered their verdict in accord with the evidence they heard in this case uninfluenced by any outside influence of any kind." *Ibid.*

4. The Court of Criminal Appeals of Texas affirmed the trial court's ruling on direct review. Pet. App. 261a, 286a. It recited the evidence on this claim, and determined that petitioner "failed to prove the presence of a Bible in the jury room was outside influence that affected the jury's verdict in violation of Article 36.13." *Id.* at 286a.

5. This Court thereafter denied petitioner's first certiorari petition. Pet. App. 59a.

6. a. Petitioner subsequently filed an application for a writ of habeas corpus in federal district court. Pet. App. 57a. That court denied petitioner's request for an

evidentiary hearing (a decision petitioner does not challenge here), and also rejected his claims on the merits. *Id.* at 62a-66a.

b. The district court also granted petitioner's request for a certificate of appealability on his Sixth Amendment claims. Pet. App. 67a-68a.

7. A panel of the Fifth Circuit affirmed. Pet. App. 30a.

a. The panel first held that the "jury's use of the Bible during the sentencing phase * * * amounted to an improper external influence on the jury's deliberations." Pet. App. 30a. The panel examined the existing Supreme Court case law on the issue, and concluded that the Court has "clearly established a constitutional rule forbidding a jury from being exposed to an external influence." *Id.* at 12a. The panel then reviewed the existing circuit law, openly acknowledged the split of authority on this question, and determined that the jurors erred in consulting material that was "not part of the law and evidence that the jury was to consider in its deliberations." *Id.* at 20a-21a.

b. The panel next turned to a harmless-error analysis. It held, first, that the *Brecht* standard of review applied to constitutional errors of this nature, Pet. App. 24a; and, second, that the state court's factual findings were entitled to deference: petitioner "failed to demonstrate that the state court's finding that the Bible did not influence the jury lacks 'even fair support in the record,'" *id.* at 28a-29a.

REASONS FOR DENYING THE PETITION

Petitioner has indeed identified an important issue that has sharply divided the circuits—an issue that implicates the constitutional right to an impartial jury, and one that presumably applies to civil as well as criminal matters. See, *e.g.*, U.S. Const. amend VI; *Remmer* v. *United States*, 347 U.S. 227, 229-30 (1954); *Wilson* v. *Vermont Castings*, 170 F.3d 391, 395 (3d Cir. 1999) (applying comparable standards in the civil context); *Haley* v. *Blue Ridge Transfer*, 802 F.2d 1532, 1535 (4th Cir. 1986) (same). This issue, therefore, has the very real potential to deeply affect jury deliberations in virtually every single trial, civil and criminal, across the nation. Nevertheless, though the question truly is important and recurring, this is not the right vehicle for resolving it.

Petitioner's first question presented—focusing on his main constitutional claim—suffers from a variety of critical vehicle problems, and in any event lacks merit. His second question presented—focusing on the standard of review—is not the subject of any genuine circuit split, and is otherwise unworthy of the Court's attention. And his third question presented—a fact-bound attack on the lower court's application of settled law to the unique circumstances of this case—is both incorrect in substance and insubstantial in importance.

The critical constitutional question raised in this petition should be resolved in a case where it will have at least a realistic chance of affecting the outcome. That is not the situation here. Given its recurring nature, another opportunity should soon arise to evaluate the claim where it properly belongs: on *direct review*, outside the stringent AEDPA framework. Given the substantial barriers to

reaching the merits in the procedural posture of this case, the petition should be denied.

I. THIS CASE IS NOT A PROPER VEHICLE FOR RESOLVING THE FIRST QUESTION PRESENTED

Petitioner's first claim—that the jury's limited use of the Bible during sentencing proceedings violated his right to an "impartial jury" (Pet. 21-26)—suffers from at least four substantial vehicle problems and (in any event) lacks merit. Because the Court can resolve this case without resolving the question presented, further review is not warranted.

A. This petition is an unsuitable vehicle for reviewing the underlying constitutional issue for a fundamental reason: the case arises not on direct review but collateral attack. As discussed below, petitioner cannot possibly win under the controlling AEDPA standard. The question is not whether the state courts erred, but instead whether the error was "clearly established" under this Court's precedent. 28 U.S.C. 2254(d)(1). The very split among the circuits—including carefully reasoned decisions by unanimous panels on each side—eliminates any conceivable argument that the law is so clear that the state-court decision is subject to correction on collateral review. This accordingly is the rare case in which the undeniable existence of a circuit split warrants a quick and obvious *deny*. See, *e.g.*, *Carey* v. *Musladin*, 549 U.S. 70, 76 (2006) (finding that evidence of wide lower-court "diverge[nce]" over an issue "[r]eflect[s] the lack of guidance from this Court").

1. In a long series of cases, this Court has repeatedly reinforced that Congress meant what it said when it

ordered federal courts not to upset state convictions not obtained in violation of "clearly established" law, 28 U.S.C. 2254(d)(1). See, *e.g.*, *Brown* v. *Payton*, 544 U.S. 133, 143 (2005) (reviewing state-court decision applying Supreme Court precedent "to similar but not identical facts" and concluding that "[e]ven on the assumption that its conclusion was incorrect, it was not unreasonable, and is therefore just the type of decision that AEDPA shields on habeas review"); *Wiggins* v. *Smith*, 539 U.S. 510, 520 (2003) (AEDPA "circumscribe[s]" the Court's consideration of petitioner's habeas claims and "limit[s]" its analysis "to the law as it was 'clearly established' by our precedents at the time of the state court's decision"); see also *Carey*, 549 U.S. at 81 (Kennedy, J., concurring) (a rule should be "established in this Court before it can be grounds for relief" on habeas review).

Nor were these congressional constraints on habeas relief mere technical requirements. These restrictions reflect the important and substantial policy interests in "comity, finality, and federalism." *Williams* v. *Taylor*, 529 U.S. 420, 436 (2000); see also *Duncan* v. *Walker*, 533 U.S. 167, 178 (2001) (same). "A federal court's collateral review of a state-court decision must [accordingly] be consistent with the respect due state courts in our federal system." *Miller-El* v. *Cockrell*, 537 U.S. 322, 340 (2003). Part of that respect entails leaving in place *reasonable* state-court decisions, even if a reviewing court disagrees with the ultimate conclusion on the merits. *Bell* v. *Cone*, 535 U.S. 685, 697 (2002).

These principles collectively doom petitioner's claim. In inviting the Court to discard AEDPA's limitations—and reach the merits of a constitutional question over which

the law is unavoidably unclear—petitioner plainly errs. Indeed, petitioner's proposed course of action is indistinguishable from the analysis that resulted in this Court summarily reversing the Ninth Circuit twice on a single day at the start of the 2002 Term. See *Woodford* v. *Visciotti*, 537 U.S. 19 (2002) (per curiam); *Early* v. *Packer*, 537 U.S. 3 (2002) (per curiam). Because it makes no difference "[w]hether or not [the Court] would reach the same conclusion" as the state court here, *Woodford*, 537 U.S. at 27, petitioner's first question presented is irrelevant to the outcome of this proceeding. Review should accordingly be denied. See also *Early*, 537 U.S. at 11 (noting that the Court would reach the same result—reversing the Ninth Circuit for improperly discarding a state-court decision—"[e]ven if we agreed with the Ninth Circuit majority" on the merits).

2. Nor is there any real dispute that the law is unsettled in this area. See Pet. 5 (recognizing the circuit conflict over the "impartiality" question). The very fact that circuits have divided over whether there is *any* error (much less clearly established error) eliminates any plausible argument that existing Supreme Court law resolves this question.

Indeed, the Fourth Circuit has alternately recognized these kinds of juror actions as legitimate (on the one hand) and recognized the uncertainty itself as a basis for denying habeas review (on the other). Compare, *e.g.*, *Burch* v. *Corcoran*, 273 F.3d 577, 590-91 (4th Cir. 2001) (holding that juror's quoting of the Bible during deliberations—both from memory and by reading—"did not constitute an improper jury communication"), with *Robinson* v. *Polk*, 438 F.3d 350, 361-66 (4th Cir. 2006)

(declaring the pre-existing case law non-controlling and distinguishing *Tanner* v. *United States*, 483 U.S. 107 (1987), *Parker* v. *Gladden*, 385 U.S. 363 (1966), *Turner* v. *Louisiana*, 379 U.S. 466 (1965), and *Remmer* v. *United States*, 347 U.S. 227 (1954)); and *Robinson* v. *Polk*, 444 F.3d 225, 225-30 (4th Cir. 2006) (Wilkinson, J., concurring in the denial of reh'g en banc). Moreover, the Ninth Circuit—after first outright declaring the practice constitutional, *Fields* v. *Brown*, 431 F.3d 1186, 1208-09 (9th Cir. 2005)—granted en-banc rehearing and ultimately left the question unanswered by concluding that any error was harmless in the context of that case, *Fields* v. *Brown*, 503 F.3d 755, 780-81 (9th Cir. 2007) (en banc). Notwithstanding the technical backtracking, the en-banc majority's opinion still suggested with strong language that the practice was permissible. *Id.* at 780 (characterizing the Biblical verses as "notions of general currency that inform the moral judgment that capital-case jurors are called upon to make"). And, finally, the Tenth Circuit has apparently considered the practice so well settled—and so plainly constitutional—that it refused to grant a certificate of appealability to review an improper-juror-conduct claim. *Neill* v. *Gibson*, 278 F.3d 1044, 1064 n.8 (10th Cir. 2001).

The Fifth Circuit, by contrast, reached exactly the opposite conclusion on the same issue in its decision below, relying on cases from the First, Sixth, and Eleventh Circuits for support. See Pet. App. 14a-23a. The split is therefore real, defined, and openly acknowledged—and is precisely the reason the petition is manifestly *inappropriate* for review.

In short, when lower courts sharply split over a constitutional question—with some suggesting the conduct is perfectly *permissible*—it is difficult to characterize the law as "clearly established." 28 U.S.C. 2254(d)(1). For that very reason, circuit "splits" on the underlying merits are rarely properly resolved in the habeas context, as the "necessary condition for federal habeas relief"—clearly established law—is routinely left unsatisfied. *Kane* v. *Espitia*, 546 U.S. 9, 10 (2005) (per curiam).

3. This split is perhaps unsurprising in light of the fact that existing Supreme Court case law does *not* resolve this question. See *United States* v. *Lara-Ramirez*, 519 F.3d 76, 88 (1st Cir. 2008) ("We have never decided a case involving a Bible in a jury room, nor has the Supreme Court.").

As a preliminary matter, the Fifth Circuit has overstated the reach of existing Supreme Court precedent on this subject. Every single decision cited in the panel's opinion addressed *factual* information—the kind of extrinsic evidence that aids a jury's understanding of the defendant's *factual* innocence or guilt—or cases in which third parties sought to coerce jurors into voting a certain way. See, *e.g.*, *Robinson*, 438 F.3d at 363 (finding it reasonable to conclude that "the Bible had no bearing on any *fact* relevant to sentencing, and was therefore not tantamount to 'evidence' that was used against him at sentencing," distinguishing *Parker* and *Turner*) (emphasis in original); *Billings v. Polk*, 441 F.3d 238 (4th Cir. 2006). Petitioner has wholly failed to identify any of this Court's precedent applying the same rule to information implicating only *moral* beliefs—not the kind of evidence typically introduced at trial, but the personal thoughts

and moral outlook that a juror is supposed to bring to deliberations. See, *e.g.*, *Fields*, 503 F.3d at 780 (contrasting "'the [factual] question of innocence or guilty of the offense'" with capital sentencing, which is "'a matter of reasoned moral judgment'").

These distinctions undoubtedly matter: "the task of jurors at the penalty phase is qualitatively different form that at the guilt phase"; "[a]t the penalty phase, jurors are asked to make a normative determination—one which necessarily includes moral and ethical considerations—designed to reflect community values." *People* v. *Danks*, 82 P.3d 1249, 1277 (Cal. 2004). It stands to reason that a rule governing the use of information at one phase therefore might not control the use of a categorically different kind of information at a qualitatively different stage of trial. Because "Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law," *Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004), the court below erred in assuming that a general rule, structured to meet the needs of controlling a factual record, would apply across the board—even where the kind of inputs affecting moral outlook are not required to be introduced through witnesses at trial. See *Fields*, 503 F.3d at 780 ("It is difficult to see how sharing notes can be constitutionally infirm if sharing memory isn't."); *Billings*, 441 F.3d at 248 (explaining that *Remmer*'s rule does not obviously apply "whenever a juror reads a book that influences his thinking about the case").

Because the Court can dispose of petitioner's claim solely on the lack of clearly established law, there is no

reason to reach the underlying merits: "Our own consideration of the merits * * * is for another day, and this case turns on the recognition that no clearly established law contrary to the state court's conclusion justifies collateral relief." *Wright* v. *Van Patten*, 128 S. Ct. 743, 747 (2008) (per curiam). This alone is a compelling reason to deny review.

B. For predominantly the same reasons, the anti-retroactivity rule in *Teague* v. *Lane*, 489 U.S. 288 (1989) (per curiam), stands as another substantial barrier to reaching the underlying question on the merits. See *Horn* v. *Banks*, 536 U.S. 266, 272 (2002) (per curiam) (holding that *Teague* stands as an independent bar to certain relief sought in habeas proceedings). Under *Teague*'s command, new constitutional rules of criminal procedure are inapplicable on collateral review unless they qualify as "watershed" rules. 489 U.S. at 311. And if petitioner's new rule cannot apply immediately, this case does not present an adequate vehicle for addressing it.

As an initial matter, there is no serious contention that this rule, unlike virtually all others preceding it, fits within the exceedingly narrow category of "watershed" developments. See, *e.g.*, *Tyler* v. *Cain*, 533 U.S. 656, 665, 667 n.7 (2001). And, critically, petitioner's theory, if adopted, would plainly stand as a "new" rule: the holding is not so "'*dictated*'" by existing precedent that no "'reasonable jurist[]'" would decline to adopt it. *Beard* v. *Banks*, 542 U.S. 406, 413 (2004); see also *id.* at 411 (asking whether existing precedent "compels the rule"). The same division of authority cited above—and the same distinctions between the subject-matter of existing precedent (factual record) and the impartiality objection at

issue here (moral outlook)—demonstrate that reasonable jurists not only can but *have* found existing precedent not to "compel" the rule sought in this case. See, *e.g.*, *Fields* v. *Brown*, 503 F.3d 755, 780 (9th Cir. 2007) (en banc); *Robinson* v. *Polk*, 438 F.3d 350, 362-66 (4th Cir. 2006).

Because *Teague* presents its own distinct obstacle to relief irrespective of the underlying merits of petitioner's claim, it demonstrates yet another reason that this case is an inappropriate vehicle for deciding the Sixth Amendment question. *Horn*, 536 U.S. at 272 ("in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state").

C. There is an additional reason why this petition is a particularly poor vehicle to address this constitutional issue: petitioner *prevailed* on this issue below, and simply failed to obtain relief on other grounds. See Pet. App. 23a-30a. Because these constitutional errors are subject to the *Brecht* standard of review, see Part II, *infra*, there is no "need to decide whether there was juror misconduct because even assuming there was," it is apparent that the Bible consultation "had no substantial and injurious effect or influence in determining the jury's verdict." *Fields* v. *Brown*, 503 F.3d 755, 781 (9th Cir. 2007) (en banc); see also Pet. App. 23a-30a (so holding). Because the Court has no reason to resolve the underlying constitutional question when any recognized error would lack the requisite impact on the ultimate disposition, this is not a suitable vehicle for resolving this question.

D. The petition also suffers from a final potential vehicle problem: invited error. As respondent noted in his

supplemental brief before the Fifth Circuit (at 20-21), petitioner's counsel, in his closing argument, explicitly invited the jury to consider passages from the Bible, including one focused on "forgive[ness]." 43 Rep. Rec. 195. Having asked the jury to consider the Bible when exercising moral judgment during sentencing, petitioner cannot obviously now fault the jury for following his counsel's own suggestion. This further undermines this petition as the right vehicle for resolving this important and difficult question. See, *e.g.*, *United States* v. *Wells*, 519 U.S. 482, 488 (1997) (noting invited error as a "consideration[] bearing on whether to decide a question" even after a petition has been granted for review) (citing *Springfield* v. *Kibbe*, 480 U.S. 257, 259-60 (1987) (per curiam)).

E. In any event, petitioner's theory is wrong on the merits. As established above, there is a clear and material distinction between information affecting the factual record and information shaping moral beliefs.

The Court's case law on external influence is focused on the need to ensure that *factual* evidence is admitted through the witness stand, where it is challenged by cross-examination, subject to judicial scrutiny, and tested through the adversarial process. See, *e.g.*, *Turner*, 379 U.S. at 472-73. It logically follows that the category of information barred by the "external evidence" rule is the kind of information naturally subject to these constraints: evidence that ordinarily enters the record through official court proceedings, not through outside sources. *Robinson*, 444 F.3d at 225 (Wilkinson, J., concurring in the denial of en-banc reh'g).

By contrast, the kind of information that typically shapes one's moral beliefs typically arises outside the judicial process (whether gained from religious sources, non-religious sources, philosophy texts, or any other resource). None of this information is subject to cross-examination, introduced through a witness, or tested by the adversary process. And yet no one "suggests that [jurors] are not free to recite these points, including those from the Bible, or to resort to their reasoning." *Fields*, 503 F.3d at 780; *Robinson*, 438 F.3d at 364 ("reading the Bible is analogous to the situation where a juror quotes the Bible from memory, which assuredly would not be considered an improper influence").

If "morality based" information is permitted prior to the empaneling of a jury, it is difficult to see why a different rule should attach if the same information arises during jury deliberations. The timing has no obvious constitutional significance under any controlling case law. The standard is appropriately focused on *substance*, not timing. If the information is permissible at all, it must be permissible no matter when it is obtained. Along the same lines, extrinsic factual evidence concerning questions of guilt or innocence is problematic no matter when a juror receives the information—for example, a juror learning of a suppressed confession before the jury is empaneled would implicate the same impartiality concerns as a juror learning of the same evidence during deliberations.

Jurors are charged with exercising moral judgment, and it is assumed that they do so when addressing difficult moral issues. It is widely accepted that these judgments are dependent upon a person's life experiences and ordinary interactions. Yet these very influences are

not introduced in open court; they do not become part of the evidentiary record; they are not expressed through the witness stand, cross-examined, or tested against any legal standard by a judge. They are, in fact, part of who the jurors are—and therefore are properly recognized as the collective wisdom brought together when a cross-section of the community is selected to form a 12-person jury. The information shaping a juror's moral outlook is not automatically invalid simply because it arises during the course of trial.

II. THE SECOND QUESTION PRESENTED FAILS TO IMPLICATE ANY CIRCUIT SPLIT AND IS OTHERWISE UNWORTHY OF REVIEW

A. Petitioner is incorrect that this case presents a second purported split. There is no genuine conflict at all over the correct standard for determining harmlessness. Every circuit to have squarely addressed the question has uniformly held that the standard in *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993)—the same standard that this Court has repeatedly held applies to virtually all constitutional claims on collateral review, see, *e.g.*, *Fry* v. *Pliler*, 127 S. Ct. 2321, 2325 (2007)—is also the standard that applies here: unless petitioner can show that the error had a "substantial and injurious effect" on the outcome, he cannot obtain relief. See, *e.g.*, Pet. App. 24a-25a ("on habeas review, we do not use the normal harmless error analysis"; "habeas petitioners are not entitled to relief based on a constitutional error unless the error 'had [a] substantial and injurious effect'" on the outcome); *Fields* v. *Brown*, 503 F.3d 755, 781 (9th Cir. 2007) (en banc) (applying *Brecht* to an analogous claim); *Crease* v. *McKune*, 189 F.3d 1188, 1192 (10th Cir. 1999)

(same); *Bibbins* v. *Dalsheim*, 21 F.3d 13, 16 (2d Cir. 1994) (same).

Petitioner claims (Pet. 26-28) that the Eleventh Circuit has in fact adopted a lower standard in *McNair* v. *Campbell*, 416 F.3d 1291 (11th Cir. 2005), but that is wrong. In that case, the panel found the prisoner's claim procedurally defaulted, so any comment on the appropriate standard of review was merely dicta. See 416 F.3d at 1307 ("the district court should have dismissed this claim as procedurally barred"). It also was particularly *meaningless* dicta: the panel said only that the error was harmless beyond a reasonable doubt—meaning that the state in that case could have satisfied *any* standard (including the stricter *Brecht* standard), so any holding that a lesser standard applied was dicta once again. See *id.* at 1309 ("Because the state could successfully rebut the presumption of prejudice arising from the jury's consideration of extraneous evidence, McNair would not have been entitled to relief on this claim even if he had properly raised it in the state court.").

What's more, the panel nowhere confronted the "standard of review" question as framed here. It did not acknowledge *Brecht* (in order to adopt or reject it). And it did not ask whether different standards should apply in direct and collateral review. *McNair* accordingly does not create a reasoned split warranting any further review. See also *Fields*, 503 F.3d at 782 n.21 ("the court in *McNair* held that the issue was procedurally defaulted" and "stated that even if it weren't there was no prejudice").

B. In any event, petitioner's theory is irreconcilable with *Brecht* and its controlling rationale. Every one of

Brecht's concerns—fostering comity and federalism, preserving finality, limiting the habeas writ to its traditional function of protecting only those "grievously wronged," and respecting state sovereignty over criminal matters—applies with full force to this case. See 507 U.S. at 633-34.[1]

C. In the alternative, petitioner argues that this kind of constitutional error should be subject to an irrebuttable presumption of prejudice. Pet. 28-34. The novel contention that this type of ordinary constitutional error should be subject in this collateral challenge to automatic reversal—a standard not even applicable on direct review, see *Remmer* v. *United States*, 347 U.S. 227, 229 (1954)—would stand every single one of Congress's core restrictions on habeas review (as all notions of comity, federalism, and finality) straight on its head. Cf. *United States* v. *Lara-Ramirez*, 519 F.3d 76, 88 (1st Cir. 2008) (rejecting the argument that the "taint" arising from a "Bible in the jury room * * * cannot be cured"). It would also impose great social costs—requiring countless retrials for "errors" that had no conceivable effect on the

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1. In any event, this question is not adequately presented here, because petitioner clearly fails to satisfy any standard of harmlessness. The state court determined that no juror would have changed his or her vote as a result of reading the Bible. Because that finding is supported by the record and is not "unreasonable" (28 U.S.C. 2254(d)(2)) or contradicted by "clear and convincing evidence" (28 U.S.C. 2254(e)(1)), it is controlling on collateral review. See *Mitchell* v. *Esparza*, 540 U.S. 12, 17-18 (2004). Petitioner therefore cannot satisfy any standard of harmless error: if, as a historical matter, the error was in fact harmless, it necessarily follows that it was legally harmless, too. This is yet another reason that the petition should be denied.

outcome—without any countervailing benefit. See *Rushen* v. *Spain*, 464 U.S. 114, 118-19 (1983).

Finally, Petitioner's theory has no obvious limiting principle and hence would prove unworkable in practice. The petition reflects a clear inability to distinguish this putative constitutional error from any other constitutional error that the Court has repeatedly found is appropriately evaluated under harmless-error review. After all, the claim at its core is that the jury considered "evidence" that should have been excluded from the record. But this complaint describes the vast majority of trial errors: the admission of evidence from wrongful searches and seizures; the consideration of coerced or otherwise flawed confessions; the introduction of tainted evidence; the use of hearsay evidence from witnesses not subject to confrontation; prosecutorial comments about a defendant's refusal to testify; and so on—all leave the jury considering another evidentiary piece that should have been excluded from the puzzle. Yet the Court has routinely found such errors subject to harmless-error analysis, because the impermissible evidence can always be evaluated against the permissible evidence, and a conclusion reached about how an objective juror might have been swayed (or not) by what should not have been there. See *Fry*, 127 S. Ct. at 2325-26; *Brecht*, 507 U.S. at 629-30.

There is absolutely no reason to impose a different standard here—and, perhaps for that very reason, the Court's precedent directly addressing the effects of external evidence has always held that the hint of prejudice could be proved harmless on appeal (even on direct review). See, *e.g.*, *Remmer*, 347 U.S. at 229.

Petitioner has failed to identify any reason to back away from this sound standard.

III. THE THIRD QUESTION PRESENTED ONLY SEEKS TO REVISIT A FACT-BOUND DISPUTE UNWORTHY OF REVIEW

A. Petitioner's final argument is that the lower courts "incorrectly applied" AEDPA's provisions to the facts of this case. Pet. 38. This is a fact-bound challenge. Petitioner does not question the applicable legal framework, and for good reason: Congress was hardly equivocal in its command that federal courts defer to state-court fact-finding. See 28 U.S.C. 2254(d)(2), (e)(1); see also *Rushen* v. *Spain*, 464 U.S. 114, 120 (1983). He simply disagrees with how all the courts to date have understood the factual record.

This is a capital case, and so alleged factual errors do deserve careful scrutiny. But this claim has been carefully addressed by multiple state and federal courts on direct and collateral proceedings. These courts have all scrutinized the factual record and all reached the same conclusion: petitioner has failed to show that any reference to the Bible had any effect on the jury's deliberations. See, *e.g.*, Pet. App. 28a-30a. There is no reason for the Court to grant review for the single purpose of reassessing (and, inevitably, reaffirming) the particular factual-findings in this single case. This claim consequently does not warrant further view.

B. Nor is Petitioner correct that the state courts improperly truncated his factual examination. Specifically, Petitioner argues that he was prevented from questioning the jury about the Bible's impact on the actual

deliberations, yet punished for not demonstrating that very kind of impact. This is incorrect. The state court properly restricted the inquiry into the jury's mental processes—such an inquiry is forbidden under both state and federal law, see Fed. R. Evid. 606; Tex. R. Evid. 606, and for significant policy reasons. See, *e.g.*, *Tanner v. United States*, 483 U.S. 107, 120-21 (1987).

Furthermore, the factual findings that the state courts made—and the Fifth Circuit found worthy of AEDPA deference—consisted of two categories of *historical* facts, and each were equally open for petitioner to explore: first, the objective facts surrounding the jury's deliberations (including what materials were reviewed at what time by which jurors); and second, a reasonable inference based on those objective facts. Pet. App. 28a-30a. The state court's ultimate findings accordingly were not based on direct testimony about how the Bible may have affected an individual juror's internal thoughts. They were instead based on what happened (from the view of a neutral outside observer) *factually* during deliberations.

And the state court's findings, far from clearly wrong, in fact had ample record support. A number of jurors, for example, testified that the Bible was not even consulted until after the sentencing vote was submitted; they were simply looking for consolation while awaiting their return to the courtroom. Since a post-hoc reading cannot possibly affect a vote already cast, the court's findings are easily supported by this testimony alone.

Moreover, all jurors testified that the Bible was read and discussed only in small groups, never during full deliberations—an objective fact that supports an inference that the Bible was not used as a material factor in the

overall discussions or decision (since the entire jury was never once focused on it).

Finally, every single juror at the hearing testified that the jury was properly instructed to consider only the Court's legal charge and apply it to the evidence in the record, and that no one, at any point, suggested that the legal standard be supplanted by a religious one. Given the traditional presumption that jurors are presumed to follow the court's instructions, see, *e.g.*, *Fields* v. *Brown*, 503 F.3d 755, 782 (9th Cir. 2007) (en banc) (citing *Kansas* v. *Marsh*, 548 U.S. 163 (2006)), this too supports a finding that the jury was not unduly swayed by any identified "outside" influence.

There is no basis in the record for upsetting these factual findings. Petitioner has not cited any admissible evidence that undercuts these facts, and does not suggest how his view is even consistent with the objective record evidence. This dooms his claim: once the historical facts are established, it is plainly reasonable to infer that the jury was not unduly influenced—if influenced at all—by what a handful of jurors read in the Bible during a time when the group was not deliberating as a whole. Because that conclusion reflects the most natural reading of the factual record, it certainly was not "objectively unreasonable" or undercut by "clear and convincing" evidence. See 28 U.S.C. 2254(d)(2), (e)(1); *Rushen*, 464 U.S. at 121 n.6. The court below hence was correct to defer to the factual findings.[2]

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2. Petitioner has not challenged (and therefore has waived) any objection to the Fifth Circuit's decision on the ground that it asked what *these* individual jurors (as opposed to an objective juror) would

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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have thought. To be sure, it is far from obvious that the Fifth Circuit's holding actually turned on anything but an objective standard. But to the extent an objective standard applies (and, furthermore, to the extent the lower court failed to follow it), any challenge is plainly waived. Petitioner's argument is premised not on the notion that the beliefs of the actual jurors were irrelevant, but rather that they were so highly relevant that the state court erred in refusing to permit a searching inquiry into the specific mental processes of each juror in reaching a final decision. Pet. 34-36. That contention is surely wrong on the law—this Court alone has rejected it on a number of occasions. *E.g.*, *Rushen*, 464 U.S. at 121 n.5. But any contrary challenge, based on the (flawed) notion that the factual findings were wrongly focused on individual juror's mental perceptions, is just as surely waived.

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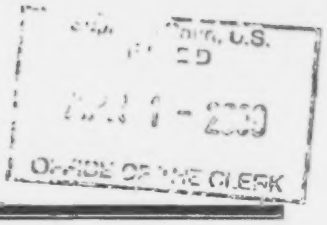

No. 08-833

IN THE
SUPREME COURT OF THE UNITED STATES

KHRISTIAN OLIVER,
Petitioner,
v.
NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Respondent acknowledges the Petition presents a constitutional claim that is "highly important and frequently recurring." Brief in Opposition ("Br. Opp.") 1. Respondent further concedes the Petition concerns "an important issue that has sharply divided the circuits . . . [and] implicates the constitutional right to an impartial jury . . . ." Br. Opp. 7.

The *amicus* brief submitted by dozens of former federal and state prosecutors similarly describes juror Bible consultation as a "recurring and important" issue, and expresses concern "the division among U.S. Courts of Appeals on this issue enables tainted capital sentences to stand and undermines public confidence in the ability of the U.S. criminal justice system to render unbiased judgments." *See* Brief of Former Federal and State Prosecutors 1; *see also* Jeremy B. Sporn, *Legal Injection? The Constitutionality of the Bible in Capital Sentencing Deliberations*, 83 TUL. L. REV. 813, 814-15 (2009) (describing "capital juror Bible consultation" as "a national problem in need of a national solution," and observing "[t]he issue is ripe for review by the United States Supreme Court").

Because the Petition presents important and recurring constitutional questions which have divided lower courts, and also concerns the proper interpretation and application of AEDPA, the Petition should be granted.

I. THE EXISTENCE OF A CIRCUIT "SPLIT" DOES NOT PRECLUDE REVIEW

Despite repeatedly acknowledging this case presents an "important" and "recurring" issue about which lower courts are divided, Respondent suggests the Petition for Certiorari should be denied because, in Respondent's view, it "is not the right vehicle for resolving it." Br. Opp. 7.

Respondent's central argument against review is the claim that the very existence of a "split" among lower courts about the constitutional implications of juror Bible consultation establishes the underlying state court ruling here could not have been an "unreasonable application" of "clearly established" law, as determined by this Court.

Respondent's argument is misguided.

First, this Court has never held the mere *existence of disagreement* among lower courts about an issue *necessarily* precludes finding that a court taking one side of such a disagreement has unreasonably applied clearly established Supreme Court case law. Not surprisingly, Respondent fails to cite a decision of this Court supporting the bold assertion that "the very fact that circuits have divided over whether there is *any* error . . . **eliminates** any plausible argument that existing Supreme Court law resolves this question." Br. Opp. 10 (italics in original; bold emphasis added); *see also id.* at 8 ("The very split among the circuits . . . **eliminates** any conceivable argument that the law is so clear that the state-court decision is subject to

correction on collateral review") (bold emphasis added).[1]

Second, this Court's own actions disprove Respondent's categorical claim that the *existence of disagreement* among lower courts about an issue necessarily precludes finding that a court unreasonably applied clearly established law.

This Court has, for instance, granted certiorari to review habeas cases where there was a split among lower courts about an underlying issue, and proceeded to review the *merits* of arguments for relief under AEDPA's "clearly established" standard. In fact, that is precisely what happened in *Carey v. Musladin*, 549 U.S. 70 (2006), cited by Respondent (Br. Opp. 8). In *Carey*, while noting lower courts "diverged widely" in their treatment of the underlying issue, the Court nevertheless conducted *its own* assessment of whether or not the state court's decision was contrary to, or an unreasonable application of, clearly established law. 549 U.S. at 76-77. Nowhere in *Carey* did this Court say, or even imply, that its conclusion the state court had not

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[1] The Fifth Circuit seemingly was unaware of the purported rule advanced by Respondent here, since that Court was well acquainted with the decisions of other courts regarding juror Bible consultation (13a-20a), but nevertheless concluded Bible consultation during the sentencing phase of Petitioner's trial amounted to an external influence on the jury's deliberations, and thereby deprived him of his Sixth Amendment rights under this Court's precedents. *See also* Sporn, 83 TUL. L. REV. at 842 ("Clearly established federal law on extraneous evidence and outside influence addresses the implications of a capital juror introducing the Bible into the jury room.").

acted unreasonably depended on the existence of disagreement among lower courts.

Moreover, under Respondent's logic, if one or more appellate courts determine this Court's precedents do not control in a given circumstance, then *no court* could properly conclude this Court has set forth "clearly established" law governing that situation. However, Respondent's reasoning is refuted by the fact that this Court sometimes concludes its preexisting decisions have clearly established an applicable rule of law after a lower court determined otherwise. *See, e.g., Panetti v. Quarterman*, 127 S. Ct. 2842 (2007); *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007); *Wiggins v. Smith*, 539 U.S. 510 (2003).

Third, Respondent's arguments appear predicated on an unduly narrow conception of what constitutes "clearly established" law as determined by this Court.

It is well-settled that under AEDPA the facts of a controversy need not be on "all fours" with the facts of this Court's prior decisions to fall within the ambit of clearly established case law. A lower court can be "unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled." *Ramdass v. Angelone*, 530 U.S. 156, 166 (2000); *see also Panetti*, 127 S. Ct. at 2858 ("even a general standard may be applied in an unreasonable manner"); *Lockyer v. Andrade*, 538 U.S. 63, 76 (2003) ("[AEDPA] permits a federal court to grant habeas relief based on the application of a governing legal principle to a set of facts different from those of the case in which the principle was announced."); *Williams v. Taylor*, 529

U.S. 362, 407 (2000) ("[A] state-court decision also involves an unreasonable application of this Court's precedent if the state court . . . unreasonably refuses to extend [a legal] principle to a new context where it should apply."); *Carey*, 549 U.S. at 81 (Kennedy, J., concurring) ("AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied.").[2] That is what occurred in the state court in this case, as the Fifth Circuit correctly observed. (14a, 22a-23a).

Fourth, Respondent's assertions about this Court's prior rulings on "external influences" should be viewed with skepticism in light of prior representations by the State of Texas to this Court.

In May 2008, this Court received a petition for certiorari in a direct appeal from a trial in Texas in which jurors consulted the Bible during capital sentencing deliberations. Opposing certiorari in that case, the State observed "[t]his Court has held that a defendant's Sixth Amendment right to an impartial jury is violated when exposed to outside influences during its deliberations," and opined that "[w]hether an influence is 'external' or 'internal' depends on the facts of each case." *Lucero v. Texas*, 07-1429, Respondent's Brief in Opposition 9. The State

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[2] The First Circuit's observation that this Court has "never decided a case involving a Bible in a jury room," *United States v. Lara-Ramirez*, 519 F.3d 76, 88 (1st Cir. 2008), therefore lends no support to Respondent's insistence that the mere existence of a circuit split establishes "Supreme Court case law does *not* resolve this question." Br. Opp. 12 (emphasis in original).

approvingly quoted Judge King of the Fourth Circuit, who, in a dissent from the denial of *en banc* rehearing in another *Bible* consultation case, explained this Court's case law as follows:

> The external influences recognized by the [Supreme] Court in those decisions are factually diverse, but they share a single characteristic: they are external to the evidence and law in the case, and carry the potential to bias the jury against the defendant . . . .

Id. at 10.[3] Then, having recited Judge King's distillation of this Court's "external influence" case law, the State declared: "This Court's rationale in this area is logical and *clear*." *Id.* (emphasis added).

The State proceeded to cite an example of the application of this Court's "clear" jurisprudence on "external influences" by quoting from the Fifth Circuit's decision ***in this very case***, including the appeals court's conclusion that "the jury's use of the Bible here amounts to a type of 'private communication, contact, or tampering' that is outside the evidence and law, which is exactly what *Remmer* sought to circumscribe." *Id.* at 10-11.

The State continued, explaining to this Court: "the passage Lucero complains of is not analogous to the Biblical instruction that certain murders should be punished by death, as in *Oliver* . . . ." *Id.* at 11.

Texas was correct when it contended in *Lucero* that this Court's "rationale" in its external influence

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[3] *See Robinson v. Polk*, 444 F.3d 225 (4th Cir. 2006).

cases is "clear," and when it identified the Fifth Circuit's decision in ***this case*** as exemplifying the application of that clear jurisprudence to juror Bible consultation during deliberations. *Id.* at 10-11. Respondent's dramatic about-face from *Lucero* should cast doubt upon its arguments against certiorari here.[4]

Fifth, Respondent's suggestion that this Court should deny certiorari in any case presented under AEDPA where there is a split among lower courts on the underlying constitutional claim is at odds with this Court's role as the ultimate arbiter of the meaning of the Federal Constitution, and responsibility to "say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Whether a course of conduct is inconsistent with clearly established law, as developed by this Court, is not determined by a head count of lower court opinions – and certainly cannot be resolved merely by identifying disagreements among lower courts. When numerous lower courts differ over the meaning and application of this Court's precedents, such differences are appropriately resolved by this Court.

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[4] In heads-I-win, tails-you-lose fashion, Respondent argues here the split at issue should "be addressed and resolved in a proper vehicle arising on *direct review*," Br. Opp. 1 (emphasis in original), after having urged the Court to deny review in *Lucero*, a direct review case, on the grounds it "is not the best vehicle . . . since the authorities to which Lucero refers are collateral attacks in the appellate courts, not direct appeals in the states' highest courts." *Lucero v. Texas*, 07-1429, Respondent's Brief in Opposition 13.

Finally, Respondent's brief dedicates considerable attention to a purported distinction between external information "affecting the factual record" and external information "shaping moral beliefs." *See* Br. Opp. 12-13, 16-17. While this supposed distinction is made without substantive discussion of this Court's decisions, Respondent's theory is a merits argument at best, and provides no basis for denying certiorari.[5]

II. RESPONDENT'S CLAIM THERE IS NO "GENUINE" OR "REASONED" CIRCUIT SPLIT REGARDING THE STANDARD FOR EVALUATING POTENTIAL PREJUDICE FROM JUROR BIBLE CONSULTATION IS UNAVAILING

Having acknowledged a "real, defined and openly acknowledged" split over Petitioner's first Question Presented (Br. Opp. 11), Respondent disputes that this case involves a second issue over which courts of appeals are divided. Br. Opp. 18.

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[5] Respondent's argument based on *Teague v. Lane*, 489 U.S. 288 (1989), Br. Opp. 14-15, is irrelevant, since retroactivity is not at issue. *Cf.* 19a n.12 (Court of Appeals: "we are not creating a new rule."). Respondent's "invited error" argument (Br. Opp. at 15-16) is specious – and so inconsequential that it was not even mentioned in the Fifth Circuit's decision. Petitioner's trial counsel did not request that the jury consult the Bible during deliberations, or "invite" erroneous judicial determinations. *Cf. United States v. Wells*, 519 U.S. 482, 488 (1997) (invited error doctrine "cannot dispositively oust this Court's traditional rule that we may address a question properly presented in a petition for certiorari").

In its decision below the Fifth Circuit acknowledged its departure from the Eleventh Circuit, observing "[n]ot all circuits are in agreement regarding the appropriate standard for determining prejudice when a jury improperly consults the Bible during deliberations." 24a n.13; Pet. 26.

Confronted with the fact of disagreement between courts of appeals about the appropriate standard for ascertaining prejudice from juror Bible consultation, Respondent resorts to describing the Eleventh Circuit's views in *McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005), as "meaningless dicta" (Br. Opp. 19), and arguing there is no "genuine" conflict (Br. Opp. 7, 18), or "reasoned split" (Br. Opp. 19), among the circuit courts.

Respondent's selective reading of *McNair* does not alter the fact that courts of appeals disagree about the appropriate standard in these cases, or obviate the need for guidance from this Court regarding the issue. *See* SUP. CT. R. 10(a).

III. THE FIFTH CIRCUIT'S ERRONEOUS APPLICATION OF AEDPA WARRANTS REVIEW

Respondent appropriately acknowledges the need for "careful scrutiny" of alleged errors in capital cases (Br. Opp. 22), but its defense of the Fifth Circuit's harmless error analysis in this case is misguided.

As an initial matter, Respondent mistakenly asserts that Petitioner complains "the state courts improperly truncated his factual examination" during juror testimony about consultation of the Bible. Br. Opp. 22.

Instead, Petitioner's contends the Fifth Circuit erred when it determined the state trial court "made a factual finding regarding the effect of the Bible on the jury." 27a. The state court made no factual finding about the *effect* of the Bible passages on the jurors' deliberations. Rather, the state trial court limited testimony to the "nature and the circumstances" under which the Bible was considered, and *specifically precluded* any testimony about "the effect it had upon the jurors." 129a-131a.[6] The state court obviously could not have found juror consultation of the Bible had *no effect* on the jurors or their deliberations, because the court received no evidence from which it could reasonably draw such a conclusion. *See* Pet. 35-36 & n.23.

Forced to concede the state court received no *direct* evidence regarding the effects of Bible consultation on any juror, Respondent defends the state court's "finding" as a "reasonable inference" based on the objective facts provided by four jurors who testified about juror consultation of the Bible in this case. Br. Opp. 23.

Respondent's effort to justify the Fifth Circuit's deference to the state court misses the mark for several reasons.

First, it ignores the threshold question of whether the state court actually "determin[ed] a "factual issue," as those terms are employed in AEDPA. *See* 28 U.S.C. § 2254(e)(1). As explained above, and in the Petition, the state court did not

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[6] Whether that limitation was proper is immaterial to the issues presented here.

actually find consultation of the Bible was without effect.[7]

Second, it ignores that one of the state court's assertions about the jurors' conduct is patently false. While the state court claimed "a conscientious, dedicated and car[ing] jury considered this case in accord with the Court's Charge and the instructions of the Court," as the Fifth Circuit itself observed, "the jurors disobeyed the court's instructions ['you are not to refer to or discuss any matter or issue not in evidence before you'] by consulting the Bible." 29a n.18. This casts serious doubt on the "reasonableness" of any "inferences" drawn by the state court from juror testimony juror Bible consultation during deliberations in this case.[8] *See* Pet. 36 n.24; 28 U.S.C. § 2254(d)(2). And it certainly should negate "the traditional presumption that jurors are presumed to follow court's instructions," advocated by Respondent. Br. Opp. 24.

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[7] *See* 5a. The state court's opaque and unsubstantiated assertion the jurors rendered their verdict "uninfluenced by any outside influence of any kind shown the Court in this hearing" is not obviously a factual conclusion at all (*e.g.*, it does not indicate whether the Court considered the Bible an "outside influence"), let alone the kind of "finding" which requires deference under AEDPA.

[8] Even Respondent seems to hedge regarding whether Bible consultation affected the jury in this case, entertaining the possibility that the jury might have been influenced, but not "unduly" so. Br. Opp. 24. Similarly, after noting "the Bible was read and discussed only in small groups," Respondent contends this "supports an inference that the Bible was not used as a *material* factor in the overall discussions or decision . . . ." Br. Opp. 23-24 (emphasis added).

Third, Respondent erroneously defends the Fifth Circuit's finding of "harmless error" by observing "all jurors testified that the Bible was read and discussed only in small groups, never during full deliberations." Br. Opp. 23. The notion that this renders the Bible consultation here "harmless" is predicated on a misreading of this Court's precedents, which make clear a defendant is "entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors," *Parker v. Gladden*, 385 U.S. 363, 366 (1966), and can be deprived of a fair trial by juror conduct or an external influence that occurs outside the context of "full" deliberations. *See, e.g., Remmer v. United States*, 347 U.S. 227, 229 (1954) (external communication with a single juror outside of jury deliberations).

Finally, Respondent disregards the Fifth Circuit's own qualms about the state court's ruling, including the appeals court's acknowledgments that "[t]he Bible . . . may have influenced the jurors simply to answer the questions in a manner that would ensure a sentence of death" (22a), and that consultation of the Bible "potentially tainted the jury's decision" (29a n.18).[9]

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[9] Respondent's defense of the state court's terse ruling, denying Petitioner a new trial based on juror Bible consultation during deliberations, at times also veers somewhat from the facts. For instance, Respondent represents: "[t]he state court determined that no juror would have changed his or her vote as a result of reading the Bible." Br. Opp. 20 n.1. This assertion lacks any citation because the state court made no such determination.

In short, there is considerable reason to doubt the Fifth Circuit correctly interpreted and applied AEDPA in this case. Petitioner respectfully suggests this Court should review the issue on its merits.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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April 1, 2009

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No. 08-833

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IN THE

Supreme Court of the United States

KHRISTIAN OLIVER,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF FORMER FEDERAL AND STATE PROSECUTORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE [1]

Amici are former federal and state prosecutors committed to the fair and impartial administration of justice in accordance with the United States Constitution. *Amici* believe it is important for this Court to address the recurring and important issue of jury consultation of the Bible, which *amici* believe is constitutionally prohibited as an improper outside influence on the jury. *Amici* are concerned that the division among U.S. Courts of Appeals on this issue enables tainted capital sentences to stand and undermines public confidence in the ability of the U.S. criminal justice system to render unbiased judgments. For the same reasons, *amici* also ask this Court to resolve the division among U.S. Courts of Appeals regarding the standard to be applied in evaluating allegations that a jury improperly consulted the Bible during its deliberations.

SUMMARY OF THE ARGUMENT

A jury that consults the Bible during sentencing deliberations is exposed to an outside influence in violation of the Sixth Amendment's guarantee of a fair trial by an impartial jury. Because U.S. Courts of Appeals are divided on this proposition, *amici* believe that this Court should

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[1] No counsel for a party authored this brief in whole or in part and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. The parties received timely notice of *amici*'s intent to file this brief and granted written consent, attached here. *Amici* are listed in the attached appendix.

grant certiorari here. This Court should also take this opportunity to settle the law regarding the appropriate standard to be used in evaluating claims of juror Bible consultation.

Even under ordinary circumstances, deprivation of a constitutional right is of the utmost concern. Such concern is all the greater here, where the constitutional violation occurs in the context of jurors' decision to impose the ultimate punishment.

REASONS FOR GRANTING THE PETITION

A. REVIEW IS WARRANTED BECAUSE CLARIFYING THE SIXTH AMENDMENT'S PROTECTIONS IN THE CAPITAL SENTENCING CONTEXT IS UNIQUELY IMPORTANT.

The lower courts urgently need guidance on the scope of the constitutional protections afforded to defendants who are sentenced to death by juries that have consulted the Bible during deliberations.

The Sixth Amendment right to a jury trial guarantees a defendant that a jury's verdict will be based on the evidence presented at trial, the court's jury instructions, and nothing beyond the bounds of the jury room. *Tanner v. United States*, 483 U.S. 107 (1987). Protecting this right is all the more important when a jury is deciding a capital case, because "the penalty of death is qualitatively different from a sentence of imprisonment," such that "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific

case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *see also Furman v. Georgia*, 408 U.S. 238, 289 (1972) (Douglas, J., concurring) ("Death . . . is in a class by itself."). As this Court held more than a century ago: "[i]t is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated." *Mattox v. United States*, 146 U.S. 140, 149-50 (1892).

To enable our courts to fulfill their constitutional mandate, enormous public resources are invested in the capital litigation process.[2] Juror consultation of

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[2] *See* E. Michael McCann, *Opposing Capital Punishment: A Prosecutor's Perspective*, 79 MARQ. L. REV. 649, 697 (1996) (noting the costs in various states of adopting capital punishment, including North Carolina ($2.6 million per case in 1993), Florida ($3.2 million per case in 1988), Texas ($2.3 million per case in 1992), New York ($118 million projected annually on all cases, in 1995), and California ($90 million per year in 1992). As the number of years the average death row inmate waits between sentencing and execution has increased dramatically over the last thirty years, from 51 months (more than four years) in 1977 to 153 months (almost 13 years) in 2007, one can assume these costs have also risen. Bureau of Justice Statistics, U.S. Dep't of Justice, *Capital Punishment, 2007 - Statistical Tables*, Jan. 2009, http://www.ojp.usdoj.gov/bjs/pub/html/cp/2007/cp07st.htm; *see also* Robert M. Morgenthau, *What Prosecutors Won't Tell You*, N.Y.TIMES, Feb. 7, 1995 at A11 (arguing that the death penalty hinders the fight against crime, as resources spent on capital punishment litigation could be better spent on preventing recidivism). Thirty-seven of the 38 states with capital statutes fund a mandatory appeals process. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, PUBL'N NO. NCJ215083, CAPITAL PUNISHMENT, 2005 (Jan. 2007) (available at http://www.ojp.usdoj.gov/bjs/pub/pdf/cpo5.pdf.

extraneous sources, including the Bible, is a recurring issue in such litigation.[3] Unfortunately, the Courts of Appeals have failed to agree upon clear rules for evaluating defendants' claims for relief based on juror Bible consultation. On the contrary, they are creating an ever-larger body of jurisprudence that is conspicuous for its irreconcilable holdings and, in several cases, disregard of well-established constitutional rights.

The lack of consensus among the U.S. Courts of Appeals regarding juror consultation of the Bible in the capital context not only generates inconsistent outcomes, it also creates the appearance of arbitrariness in an area that demands consistency and fairness. This discord can undermine public confidence in the capacity of the criminal justice system to administer the death penalty.[4] The guidance of this Court is therefore urgently needed.

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[3] *See* Oliver Petition for Writ of Certiorari, 19 fn.12.

[4] Ken Armstrong & Steve Mills, *O'Connor Questions Fairness of Death Penalty; Justice Rethinking Laws She Shaped*, CHI. TRIB., Jul. 4, 2001, at N1 (stating that former Justice Sandra Day O'Connor stated that "[a]fter 20 years on the high court, I have to acknowledge that serious questions are being raised about whether the death penalty is being fairly administered in this country"); Joshua Herman, *Death Denies Due Process: Evaluating Due Process Challenges to the Federal Death Penalty Act*, 53 DEPAUL L. REV. 1777, 1782-85, 1788-90 (2004) (citing moratoriums and studies on carrying out capital punishment in numerous states, as evidence of a "nationwide reevaluation of capital punishment" caused in part by wrongful convictions that "challenge the public's confidence in the death penalty's reliability and fairness").

B. REVIEW IS WARRANTED BECAUSE THE COURT SHOULD RESOLVE A SPLIT AMONG THE U.S. COURTS OF APPEALS OVER WHETHER THE SIXTH AMENDMENT PROHIBITS JURORS FROM BRINGING THE BIBLE INTO THE JURY ROOM FOR USE IN DELIBERATIONS.

Despite this Court's clear holding that the Sixth Amendment requires a jury's decisionmaking be free from any and all "external causes," *Mattox*, 146 U.S. at 149, there is a conflict among the U.S. Courts of Appeals over whether juror consultation of the Bible during deliberations is constitutionally prohibited.

In this case, the Fifth Circuit held that the jury's consultation of the Bible during sentencing was controlled by "clearly established Supreme Court precedents" prohibiting external influences. *Oliver v. Quarterman*, 541 F.3d 329, 336 (5th Cir. 2008), *citing Parker v. Gladden*, 385 U.S. 363 (1966) (per curiam), *Turner v. Louisiana*, 379 U.S. 466 (1965), and *Remmer v. United States*, 347 U.S. 227 (1954). The Fifth Circuit noted that the "Supreme Court counsels us that a juror may not consult material that is outside the law of the case" and found that the jury's consideration of the Bible "crossed an important line" and thus deprived petitioner of his Sixth Amendment rights. *Oliver*, 541 F.3d at 339.

The Eleventh Circuit took a similar view in *McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005). There, a Christian minister, who served as the foreman of the defendant's jury, brought a Bible into the jury room. During deliberations, the foreperson read aloud from the Bible and led the other jurors in prayer. *Id.* at 1308.

The Eleventh Circuit held that it was undisputed that the jurors improperly considered extrinsic evidence during their deliberations in violation of the defendant's Sixth Amendment rights. *Id.*[5]

In stark contrast, the Fourth Circuit has repeatedly rejected the view that juror consultation of the Bible is a constitutionally prohibited external influence. For example, in *Robinson v. Polk*, 438 F.3d 350, 364 (4th Cir. 2006), the court found that the Bible could be an "internal" influence as to jurors. *See also Billings v. Polk*, 441 F.3d 238 (4th Cir. 2006); *Lenz v. Washington*, 444 F.3d 295 (4th Cir. 2006); *Burch v. Corcoran*, 273 F.3d 577 (4th Cir. 2001).

The Ninth Circuit has likewise found that juror consultation of the Bible is constitutionally permissible. In *Fields v. Brown*, 503 F.3d 755 (9th Cir. 2007), a plurality found no juror misconduct where the jury foreperson shared with the rest of the jury transcriptions of Bible verses "for" and "against" the death penalty. The Ninth Circuit observed that the Biblical references in the foreperson's notes were "notions of general currency that inform the moral judgment that capital-case jurors are called upon to make." *Id.* at 780. The plurality concluded that where a juror reads passages from the Bible that are matters of "common knowledge," the defendant's Sixth Amendment rights are not violated. *Id.* at 779-80.

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[5] Outside the habeas context, the First Circuit has observed that jury consultation of the Bible could be an external influence. *See United States v. Lara-Ramirez*, 519 F.3d 76, 89 (1st Cir. 2008).

As demonstrated below, the only rule that can be squared with this Court's Sixth Amendment jurisprudence is one that treats the Bible as an external influence that may not be consulted by the jury during deliberations.

C. REVIEW IS WARRANTED BECAUSE THE IRRECONCILABLE CONFLICT AMONG U.S. COURTS OF APPEALS REGARDING WHAT CONSTITUTES OUTSIDE INFLUENCE ON A JURY RAISES IMPORTANT SIXTH AMENDMENT ISSUES ON WHICH THIS COURT'S GUIDANCE IS NEEDED.

Review is warranted because this Court's precedents dictate that a jury's consultation of the Bible during deliberations is unconstitutional. The Constitution requires that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial . . . by an impartial jury. . . ."[6] U.S. CONST. amend. VI; *see also Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (holding that the Sixth Amendment jury-trial right "guarantees to the criminally accused a fair trial . . . .").[7]

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[6] The Fourteenth Amendment extends the guarantees of the Sixth Amendment to the states. *Parker v. Gladden*, 385 U.S. 363, 364 (1966); *see also Morgan v. Illinois*, 504 U.S. 719, 726-27 (1992).

[7] Another Sixth Amendment guarantee may also come to bear here: the confrontation clause, which guarantees the accused the right to confront witnesses against him. *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965) (finding that the confrontation clause "necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel").

The Constitutional right to a "fair trial" by an "impartial jury" is violated when a jury's deliberations are influenced by sources beyond the evidence introduced at trial and judge's instructions regarding the law. For instance, in the leading case of *Remmer v. United States*, this Court held that an unnamed person's attempt to bribe a jury foreperson was a constitutionally prohibited outside influence. The *Remmer* court set forth the following general rule:

> In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties. The presumption is not conclusive, but the burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.

Remmer, 347 U.S. at 229; *see also Parker*, 385 U.S. at 363-64 (holding that there was an outside influence in violation of the Sixth Amendment where bailiff told juror that defendant was a "wicked fellow" who was guilty); *Turner*, 379 U.S. at 473-74 (holding that there was an outside influence in violation of the Fourteenth and Sixth Amendments where jury had "continuous and intimate

association" with sheriffs who were also key government witnesses); *Robinson v. Polk*, 444 F.3d 225, 231 (4th Cir. 2006) (King, J., dissenting) ("external influences . . . share a single, constitutionally significant characteristic: they are external to the evidence and law in the case, and carry the potential to bias the jury against the defendant"); *Wisehart v. Davis*, 408 F.3d 321, 326 (7th Cir. 2005) (Posner, J.) (holding that *Remmer* applies where there has been "extraneous communication . . . that creates a reasonable suspicion that . . . defendant was deprived of his right to an impartial jury").

Similarly, in *Mattox v. United States*, jurors in a capital case read a newspaper article about the trial and heard statements from a bailiff that included facts not in evidence and conclusions about defendant's guilt. Although this Court did not reference the Sixth Amendment, it held that the trial court committed reversible error in failing to investigate such "extraneous influence[s]," because "[i]t is vital in capital cases that the jury should pass upon the case free from external causes . . . ." *Mattox*, 146 U.S. at 149.

This Court clarified what is *not* a constitutionally prohibited outside influence in *Tanner v. United States*. There, petitioners were convicted of fraud in federal court. Citing Rule 606(b) of the Federal Rules of Evidence, the district court refused to admit post-verdict juror affidavits alleging that several jurors were often

intoxicated during the trial.[8] This Court affirmed the district court's decision, explaining that outside influences involve potentially prejudicial "information." By contrast, intoxication — like the effects of "a virus, poorly prepared food . . . a lack of sleep," or mental incompetence — is an "internal" influence that is shielded from inquiry. *Tanner*, 483 U.S. at 117, 119, 122.

In accordance with the above precedents, courts have found outside influence where a deliberating jury is exposed to *information* that (1) is outside the evidence and law in the case and (2) can potentially contribute to a jury decision that is hostile to the defendant. For example:

- In *United States v. Aguirre*, 108 F.3d 1284, 1288 (10th Cir. 1997), where the government alleged a conspiracy to distribute drugs, the jury consulted a dictionary for the definition of "distribution." The Tenth Circuit held that this "exposure to extrinsic information" was an outside influence.

- Juror consultation of a dictionary was also at issue in *United States v. Martinez*, 14 F.3d 543, 550-51 (11th Cir. 1994), an action for

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[8] Rule 606(b) of the Federal Rules of Evidence bars juror testimony concerning "(1) the method or arguments of the jury's deliberations, (2) the effect of any particular thing upon an outcome in the deliberations, (3) the mindset or emotions of any juror during deliberations, and (4) the testifying juror's own mental process during the deliberations." *United States v. Jones*, 132 F.3d 232, 245 (5th Cir. 1998); *see also Hard v. Burlington N. R.R.*, 870 F.2d 1454, 1461 (9th Cir. 1989).

racketeering and extortion. The court, citing *Remmer*, 347 U.S. at 229, found that there was a constitutionally prohibited outside influence where jurors looked up the definition of "deliberate" and other "technical" words while also becoming aware of media accounts of the trial and learning the potential prison sentence faced by the defendant.[9]

- In *United States v. Bassler*, 651 F.2d 600, 603 (8th Cir. 1981), *citing Remmer*, 347 U.S. at 229, the Eighth Circuit held that there was outside influence in violation of defendant's Sixth

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[9] Similarly, in *Mayhue v. St. Francis Hosp., Inc.*, 969 F.2d 919 (10th Cir. 1992), a civil rights action where the court's staff found in the jury room a note containing definitions of "discriminate" and "prejudice," the court held that *Remmer* applied even in the civil context.

See also Palestroni v. Jacobs, 10 N.J. Super. 266, 271 (Sup. Ct. NJ, App.Div. 1950), where Justice Brennan, writing before his elevation to this Court, granted a defendant a new trial after a judge provided a dictionary to jurors without informing defendant's counsel, observing that "[o]n elementary principles the jury's verdict must be obedient to the court's charge and be based solely on legal evidence properly before the jury."

See State v. Harris, 530 S.E.2d 626 (S.C. 2000) (holding that a juror's use of Black's Law Dictionary violated the defendant's Sixth Amendment rights). *See also United States v. Griffith*, 756 F.2d 1244 (6th Cir. 1985), *cert. denied*, 474 U.S. 837 (1985) (holding that jury's use of dictionary to define relevant legal term is prejudicial error when it alters the jury's understanding of the law); *United States v. Williams-Davis*, 821 F. Supp. 727, 739 (D.D.C. 1993) (same); *United States v. Cheyenne*, 855 F.2d 566, 568 (8th Cir. 1988) (same).

Amendment rights where a foreperson presented to the jury her notes on "Roberts Rules of Order," taken from a guide to jury duty she borrowed from a public library.[10]

- In *United States v. Rosenthal*, 445 F.3d 1239 (9th Cir. 2006), the Ninth Circuit took up the case of a juror in a federal criminal trial who had phoned an attorney friend to ask if the juror was required to follow the judge's instructions. The friend advised the juror that she "could get into trouble" if she did not obey the judge; the juror passed this advice along to a second juror. The Ninth Circuit held that, because the attorney's advice was "extraneous information regarding the law applicable to the case" (internal quotation marks omitted), there was improper outside influence. *Id* at 1244-46, *citing Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Serv. Co.*, 206 F.3d 900, 906 (9th Cir. 2000).

- In *Nevers v. Killinger*, 169 F.3d 352, 369 (6th Cir. 1999), the Sixth Circuit held that the jury had been introduced to "extraneous matters" that created at least a suspicion of improper influence where, while deliberating in a case involving white police officers who beat a black suspect, jurors viewed the movie *Malcolm X*, learned that the city was preparing for a potential riot in the event of an acquittal, and learned that

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[10] The *Bassler* court ultimately found that the government successfully rebutted the *Remmer* presumption of prejudice. *Bassler*, 651 F.2d at 603.

the defendants had been members of a controversial undercover police unit.

- In *State v. Sinegal*, 393 So. 2d 684, 687 (La. 1981), defendant was convicted of murder by a jury that consulted a 1914 compilation of "Ruling Case Law" that it found in the jury room. One juror read to the others a statement of the law regarding the impact of intoxication on intent that differed from the jury's charge. Citing *Remmer*, the court found improper outside influence, noting that "the law applied by the jury must come only from the court . . . ."[11]

Like information from a friend, a film, a dictionary, a book of debating rules, or an obsolete law code, certain passages of the Bible carry the potential to sway a jury against a defendant. Therefore, the Fifth Circuit's

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[11] So, too, in *In re Stankewitz*, 40 Cal. 3d 391 (Cal. 1985), California's highest court held that "[w]hen extraneous law enters a jury room — i.e., a statement of law not given to the jury in the instructions of the court — the defendant is denied his constitutional right to a fair trial unless the People can prove that no actual prejudice resulted." *Id.* at 397. Defendant in this case was sentenced to death for first-degree murder and robbery by a jury that included a former police officer who stated that he was expert on the relevant law due to his professional experience — and then misstated the elements of robbery under California law.

Likewise, in *Demaray v. Ridl*, 249 N.W.2d 219 (N.D. 1976), the jury in a wrongful death action found in its room a volume of caselaw that had been opened to a wrongful death case. The jury immediately set the volume aside and did not refer to it. Nonetheless, the *Demaray* court found that the trial court acted within its discretion in finding prejudicial error.

decision here and the Eleventh Circuit's decision in *McNair* — both discussed in more detail above — were correct in holding that jury consultation of the Bible is an improper external influence governed by *Remmer*.[12]

The potential influence of the Bible over a jury arises in part from the fact that many passages in the Bible are commands that are irreconcilable with contemporary federal or state law.[13] For instance, in *John* 8:1-11, Jesus refuses to authorize an execution, famously saying, "If any one of you is without sin, let him be the first to throw a stone at her." This parable could reasonably be read to mean that punishments should be imposed only by those who never have committed wrongful acts. Jurors, however,

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[12] *See also United States v. Lara-Ramirez*, 519 F.3d 76, 89 (holding that jury consultation of the Bible is no different from other "colorable claim[s] of juror taint").

[13] When we refer to "the Bible" in contemporary U.S. English, it may be assumed that we are referring to at least the Five Books of Moses, the Prophets, the Writings — called the "Old Testament" by Christians — and twenty-seven books of the New Testament. 2 NEW ENCYCLOPEDIA BRITANNICA 194 (15th ed. 2003).

The best-selling English translation of the Bible, the New International Version, can fill more than 2,000 pages, depending upon the edition. *See, e.g.*, CBA, CBA Best-Sellers (Feb. 2009), http://www.cbaonline.org/nm/documents/BSLs/Bible_Translations.pdf (reporting that the New International Version is the best-selling Bible translation at Christian retail stores in the U.S.); NIV Study Bible (2002) (2,240 pages). It is this translation that is quoted here.

are not permitted to take into consideration their own sins when deciding upon a verdict.[14]

Furthermore, the Bible situates its commandments within a narrative that imbues them with divine authority and links them with an explicit set of rewards and punishments. So, for instance, Moses says in *Deuteronomy*: "See, I am setting before you today a blessing and a curse — the blessing, if you obey the commands of the LORD your God that I am giving you today; the curse if you disobey . . . ." (*Deuteronomy* 11:26-28) The Bible may thus be read by jurors as a law code that preempts all others.

With respect to capital punishment, too, there are many Biblical passages that seem to be inconsistent with current U.S. law. For example, *Numbers* 35:16 — one of the passages actually consulted by the *Oliver* jurors — ordains that a person who murders another "with an iron object . . . shall be put to death." By contrast, the Constitution requires "consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. at 304. Thus, "[a] process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense" can be understood to be both Biblically mandated and constitutionally impermissible. *Id.*; *see also Jones v.*

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[14] *See, e.g.*, TEX. CODE CRIM. PROC. art. 35.22; Federal Judicial Center, PATTERN CRIMINAL JURY INSTRUCTIONS § 1A (1987).

Kemp, 706 F. Supp. 1534, 1560 (N.D. Ga. 1989); *Robinson v. Polk*, 444 F.3d 225, 227 (4th Cir. 2006) (Wilkinson, J., concurring) ("If the presence of a Bible in the jury room drives the collective discussion, and renders a capital sentence the result of religious command, then in my view, an important line has been crossed.").

As a practical matter, the Bible will affect every juror differently. Such effects can vary depending upon which passages are being read, by whom, to whom, in what context, and for how long. Therefore, the key question for a trial court where a jury has consulted the Bible — whether there is a colorable claim that the Bible potentially biased the jury — is not subject to broad generalization.

To the extent that the Fourth Circuit holds otherwise, it has misread *Remmer* and its progeny. For instance, in *Robinson v. Polk*, 438 F.3d 350 (4th Cir. 2006), the Fourth Circuit rejected a *habeas* petition by a death-row inmate who argued that his Sixth Amendment rights were denied where

> (1) a juror asked for, and the bailiff provided, a Bible during sentencing deliberations; (2) the juror read an 'eye for an eye' passage[15]; (3) the passage was read to the other jurors before a final vote on a death sentence; and (4) the juror read the passage in an attempt to convince his fellow jurors to vote for a death sentence.

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[15] The *Robinson* court noted that there are three separate passages in the Hebrew Bible where the phrase "eye for an eye" is used and assumed the jurors were referring to one of them. *Id.* at 359 n.8.

Id. at 358-359 (footnote omitted). Taking defendant's allegations as true, the Fourth Circuit refused to find that the trial court was unreasonable in denying defendant's request for a hearing. Instead, the court held that there is an outside influence only where there is "private communication, contact, or tampering with a juror" which "impose[s] pressure upon a juror apart from the juror himself." *Id.* at 363. Applying this rule, the court found that "the Bible is not an 'external' influence" because "the reading of Bible passages . . . . invites the listener to examine his or her own conscience from within." *Id.* In some cases, consultation of the Bible may well invite a jury to perform its duty scrupulously. In other cases, consultation of the Bible may invite a jury to convict or acquit a defendant without regard to the evidence in the case. In light of the fact that there are thousands of pages in the Bible, far more potential listeners than that, and a nearly infinite number of legal questions that can be posed to a jury, the Fourth Circuit has surprising confidence in its generalization about the effect of the Bible upon juror listeners.

The strained logic of the Fourth Circuit's *Robinson* decision results in an unreasonably narrow definition of "outside influence" that simultaneously allows *Remmer* to stand while circumventing it. Put another way: the Fourth Circuit's opinion enables habeas and appeals courts to peremptorily dispose of allegations of Sixth Amendment violations by deferring to trial courts' conclusory findings of fact without doing more. As a result, the protections crafted in *Remmer* are rendered

toothless, along with the underlying Sixth Amendment right.[16]

The Ninth Circuit's decision in *Fields* similarly circumvents the Sixth Amendment protections articulated in *Remmer*. There, a capital sentencing jury discussed notes presented by the foreperson on Biblical passages relating to the death penalty. The notes included the following language:

- "'He that smiteth a man, so that he dies, shall surely be put to death.'" (*Exodus* 21:12)

- "'Let everyone be subject to the higher authorities, for there exists no authority except from God, and those who exist have been appointed by God. Therefore, he who resists the authority, resists the ordinance of God; and they that resist bring on themselves condemnation.'" (*Romans* 13:1-5)

- "'Per Paul's letter to Romans: State has power for two reasons — 1. Satisfy demand's [sic] of God's service [and] 2. Protect society by deterring future crime.'"

Fields v. Brown, 503 F.3d at 778. The *Fields* plurality distinguished its own precedents on improper outside influence, noting that "the Biblical verses . . . contained

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[16] The Fourth Circuit has decided three additional cases involving juror Bible consultation in a manner consistent with *Robinson*: *Burch v. Corcoran*, 273 F.3d 577 (4th Cir. 2001), *Billings v. Polk*, 441 F.3d 238 (4th Cir. 2006), and *Lenz v. Washington*, 444 F.3d 295 (4th Cir. 2006).

in the notes are notions of general currency that inform the moral judgment that capital-case jurors are called upon to make" and that the notes made "general, commonly known points." *Id.* at 780.[17]

It is arguable whether, for instance, the content of *Romans* 13:1-5 ("'[H]e who resists . . . authority, resists the ordinance of God'") was in 2006 a "notion of general currency" amongst Californian jurors. Yet even if this were true, such a conclusion would have no bearing here. When jurors have been consulting the Bible, the court cannot avoid asking whether such consultation can potentially bias the jury's decision.

In support of its approach, the Ninth Circuit relied only on *Sawyer v. Whitley*, 505 U.S. 333, 370 (1992) — where Justice Stevens wrote that capital sentencing deliberations are "a matter of reasoned moral judgment" — as well as cases affirming that it is proper for deliberating jurors to resort to their personal knowledge and experiences. *Fields*, 503 F.3d at 780. That jurors may inform death penalty deliberations with their own moral views does not allow for the introduction of the Bible — an outside source — as a resource for consultation when deciding whether to impose a sentence of death. *See Robinson*, 444 F.3d at 226 (Wilkinson, J., concurring in denial of reh'g en banc).

Moreover, the guidance of the Fourth and Ninth Circuits cannot be applied by lower courts in a consistent and non-arbitrary manner. On the contrary, the

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[17] Distinguishing the facts, the court then held that it was not necessary to decide whether the conduct at issue here gave rise to an outside influence. *Fields*, 503 F.3d at 780-81.

questions raised by the Fourth and Ninth Circuit tests can be legion and divisive. Do all books of the Bible contain "common knowledge"? Which other religious texts are authorized as containing "notions of general currency"? *Fields*, 503 F.3d at 785 (Gould, J., dissenting); *see also Robinson*, 444 F.3d at 227 (Wilkinson, J., dissenting from denial of reh'g en banc) ("The jury room is not the place to debate the respective merits of the Bible, the Koran, the Torah, or any other religious scripture that Americans revere . . . ."). What about "street-corner wisdom such as might be found in popular novels of any number of current authors whose books line the supermarket shelves?" *Fields*, 503 F.3d at 785-86.

The *Remmer* rule is not subject to the same ad-hoc determinations by lower courts. Rather, under *Remmer*, whenever there is a colorable claim of improper jury consultation of the Bible, the inquiry would focus on the sole question that should be before the court: whether the consultation of the Bible potentially tainted the jury's verdict.[18]

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[18] Some have objected that, if *Remmer* governs juror Bible consultation, it would follow logically — or at least via a slippery slope — that *Remmer* would govern whenever a jury discusses Biblical precepts, or perhaps even any precepts that can be traced back to the Bible. *See, e.g.*, *Fields*, 503 F.3d at 780 ("It is difficult to see how sharing notes can be constitutionally infirm if sharing memory isn't"). But there are good reasons to refrain from extending *Remmer* in this manner. First, written texts are qualitatively different from individuals' recollections, carrying far greater authority. *People v. Harlan*, 109 P.3d 616, 632 (Colo. 2005) ("The written word persuasively conveys the authentic

(Cont'd)

Furthermore, in the context of juror consultation of the Bible, a rule that is focused on the use of a book, as opposed to a judicial inquiry into cultural norms, is eminently practical. The court's inquiry can be anchored on the actions of jurors in relation to the physical text — who introduced it, who read it, what pages were read, for how long — in a way that will obviate the necessity to inquire into the content of jurors' discussions directly.[19] This line of reasoning finds support all the way back in *Mattox*, 146 U.S. at 148-149 (U.S. 1892), which notes with approval a case where the Kansas Supreme Court agreed to receive juror testimony to impeach a verdict where what was at issue was "an overt act, open to the knowledge of all the jury," as opposed to a question of "consciousness" far less amenable to judicial inquiry.

(Cont'd)

ring of reliable authority in a way the recollected spoken word does not.") Perhaps more important, in the case of remembered Biblical teachings, there is no outside "contact" or "communication" into which the court can inquire without intruding into the heart of the jury's deliberative process. Nor in the context of juror recollection of the Bible and its teachings is there any sort of **extrinsic item** introduced — *e.g.*, the actual Bible itself.

[19] The wisdom of the *Remmer* rule is evident when it is read alongside the evidentiary rule that jurors may not impeach their own verdicts by testifying about their deliberative process. *See* note 8 above; *see also* TEX. R. CIV. PRO. Rule 327(b); 23A CORPUS JURIS SECUNDUM, CRIMINAL LAW § 1915 (2008) (stating the language of Federal Rule of Evidence 606(b), and then noting that "[s]everal states have adopted a similar rule or statutory provision," citing the law of eleven states as examples). Defendants who allege outside influence are therefore often barred from presenting the facts most relevant to the adjudication of their constitutional rights.

D. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW IRRECONCILABLY CONFLICTS WITH DECISIONS FROM OTHER U.S. COURTS OF APPEALS ABOUT THE STANDARD FOR EVALUATING POSSIBLE PREJUDICE FROM JUROR BIBLE CONSULTATION.

Even where courts agree that Bible consultation may violate the Sixth Amendment, there is disagreement regarding the appropriate standard to be used by a federal court engaged in review for potential prejudice, as the Fifth Circuit below correctly noted. *Oliver*, 541 F.3d at 341 n.13.

In *McNair v. Campbell*, 416 F.3d at 1307-09, the Eleventh Circuit, reviewing petitioner's claim of prejudice stemming from the jury's consideration of Bible passages during its deliberations, chose to apply the standard used in *Remmer*: any evidence coming into the jury room not originating from the witness stand is "presumptively prejudicial." *Id.* at 1307, *citing Remmer*, 347 U.S. at 229. Under this long-established standard, once petitioner made a showing that jurors had contact with extrinsic evidence, the burden then shifted to the state to rebut this presumption by showing that the jurors' consideration of the extrinsic evidence was harmless to the defendant. *Id.*

By contrast, the Fifth Circuit's decision below held that it would only be appropriate to grant petitioner relief based on the constitutional error of juror Bible consultation if petitioner could show that the error "had a substantial and injurious effect or influence in determining the jury's verdict," the standard set out in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *Oliver*, 541 F.3d at 341, *citing Brecht*, 507 U.S. at 637.

In using the *Brecht* standard to evaluate Oliver's claim, the Fifth Circuit joined the Ninth Circuit, which, in *Fields v. Brown*, 503 F.3d at 787, placed the burden on the petitioner to show that the consideration of extraneous material had a "substantial and injurious effect or influence" on the jury.[20]

The absence of a clear rule regarding the proper standard to apply when evaluating a claim of juror Bible consultation creates great uncertainty in the context of capital sentencing — an area where uncertainty is most undesirable.[21] In addition, a decision regarding the rule to be applied in evaluating prejudice — whether it be the *Brecht* standard, an irrebuttable presumption of prejudice, or something else — may be a significant factor in determining the outcome of such evaluations.

Given the division among the courts and the importance of the recurring issue, this Court should provide clear instruction regarding the correct procedure to be followed in evaluating violations of Sixth Amendment rights.[22]

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[20] *Fields* was decided on this question; it assumed, without deciding, that there was juror misconduct. *Fields*, 503 F.3d at 781.

[21] *See* note 4.

[22] *Amici* believe that this Court, in considering the appropriate standard for ascertaining prejudice arising from jury consultation of the Bible, also should consider whether such consultation during the sentencing phase of a capital case should raise an irrebuttable presumption of prejudice. At this stage, *amici* take no position on this issue.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

KHRISTIAN OLIVER,
Petitioner,

v.

NATHANIEL QUARTERMAN, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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INTEREST OF AMICI CURIAE

Amici curiae are law professors at law schools located in the United States.[1] Amici include con-

[1] Pursuant to Rule 37.6, Amicus Curiae certify that no counsel for a party authored this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than amicus curiae made a monetary contribution to its preparation or submissions. Pursuant to Rule 37.2(a), counsel of record for both petitioners and respondents were notified of the intent to file this brief at least 10 days prior to the filing of this

stitutional law professors, criminal law professors, and professors that have authored articles on the issues involved in the Petitioner's case.[2] As law professors, amici have an interest in the development of constitutional and criminal jurisprudence. Amici file this brief in support of the Petition for a Writ of Certiorari to address the important constitutional issues present in this case, namely a capital jury's reliance on a religious text, the Bible, in sentencing the Petitioner to the death penalty.

INTRODUCTION

On December 25, 2019, a jury in Utopia recommended that a murderer be sentenced to life in prison without parole. The jury had the option of recommending death, but recommended life without parole after consulting Section 2267 of the Catechism of the Catholic Church, which states, on part:

> If . . . non-lethal means are sufficient to defend and protect people's safety from the aggressor,

---

brief and the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

[2] Specifically Professor John Blume, Director of the Cornell Death Penalty Project, Professor of Law, Cornell Law School; Professor Stephen P. Garvey, Associate Dean for Academic Affairs, Professor of Law, Cornell Law School; Professor Lawrence C. Marshall, Professor of Law, David and Stephanie Mills Director of Education, and Associate Dean for Public Interest and Clinical Education, Stanford Law School; Professor Geraldine Szott Moohr, Alumnae Professor of Law, University of Houston Law Center; Professor Donald North, Associate Professor of Law, Clinical Education Program Director, Southern University Law Center; Professor Elisabeth Semel, Director of the Berkeley Law Death Penalty Clinic, Clinical Professor of Law, University of California, Berkeley, School of Law; and Professor Yolanda Vazquez, Clinical Supervisor and Lecturer, University of Pennsylvania Law School.

> authority will limit itself to such means, as these are more in keeping with the concrete conditions of the common good and more in conformity with the dignity of the human person. Today, in fact, as a consequence of the possibilities which the state has for effectively preventing crime, by rendering one who has committed an offense incapable of doing harm – without definitely taking away from him the possibility of redeeming himself – the cases in which the execution of the offender is an absolute necessity are very rare, if not practically nonexistent.

Following the sentencing, five of the jurors admitted reviewing Section 2267 of the Catechism during deliberations. A post-conviction hearing ensued but, in light of an evidentiary rule that forbade inquiry into the juror's deliberative process, the evidence was limited to the question of what the jurors reviewed. Nonetheless, the trial judge ruled that the jury's consultation with official exposition of the teachings of the Roman Catholic Church during capital sentencing deliberations did not effect its deliberations.

The scenario described above did not occur, but the parallels with the facts of this case are genuine.

FACTUAL BACKGROUND

A jury in Nacogdoches County, Texas convicted Petitioner of capital murder on April 20, 1999. 34a. Petitioner shot his victim and then struck him in the head with the stock of a rifle. 33a. The forensic evidence presented at trial was unclear as to whether the gunshots or the blow to the head was the cause of death. 2a. During closing arguments, the prosecutor argued that the Petitioner deserved the death penalty for striking his victim with the rifle. 149a-

150a. Prior to its deliberations as to guilt, the court instructed the jury "not to refer to or discuss any matter or issue not in evidence before you. . . ." 29a.

After being sentenced to death, Petitioner learned that during sentencing deliberations, the jury consulted, discussed, read aloud and relied upon certain biblical passages in reaching their decision. Among the passages discussed was Numbers 35:16-19, which states in part:

> And if he smite him with an instrument of iron, so that he die, he is a murderer: the murderer shall surely be put to death.
>
> . . .
>
> Or, if he smite him with an hand weapon of wood, wherewith he may die, he is a murderer: the murderer shall surely be put to death.

3a-4a n.3.

Petitioner filed a motion for a new trial and, on June 25, 1999, the state trial court held a hearing concerning the external influence of the Bible on the jury. 70a. The state court allowed the jurors to testify about whether they consulted external material, but declined to allow questioning or testimony on the effect of that external influence on their deliberations. 76a-90a; 130a; 131a. As the trial judge stated: "[W]e have to be very careful about avoiding [questions concerning] the effect [the Bible] had upon any juror, if any. . . ." 130a.

Four jurors testified at the hearing and their testimony confirmed that they consulted the Bible during the sentencing deliberations. Specifically, they consulted more than one Bible, read the Bible aloud, shared copies of a highlighted Bible, and

considered the above-quoted passage from the Book of Numbers about a "murderer" being "put to death" for smiting someone "with an instrument of iron" or a "weapon of wood." 135a-155a, 166a, 177a, 189a-192a. Nonetheless, the trial court denied Petitioner's motion for a new trial, finding that the jury "rendered their verdict in accord with the evidence they heard in this case *uninfluenced by any outside influence of any kind. . . .*' 234a (emphasis added).

Petitioner next exhausted his state court remedies, then pursued a habeas corpus petition in federal court. 6a. Petitioner's habeas claims at the state and federal levels were, in part, based on newly discovered evidence that one of the jurors, who had not testified at the hearing, gave a tape recorded interview to a journalist about the jury's Bible consultations. 6a; 47a. This juror confirmed that the jury had consulted the Bible during sentencing deliberations, stating: "We brought one right in there with us." 310a. The juror also confirmed that the jury used the Bible *before* reaching a decision, stating that the Bible consultation was:

> [l]ong before we ever reached a verdict. This was not support after the fact; this was – this was during the deliberation phase, the discussion phase inside. So it was – it had nothing to do with pre-judgment.

329a.

The juror also disclosed that:

> most of us there, about 80 percent, brought scripture into the deliberation as well as the solace from that scripture. "Are we making the right decision?" *"Is this the way the Lord would decide this case?"* This particular case, not

> unilaterally but this particular case. Given the evidence, given everything we've been presented.

328a-29a (emphasis added).

And:

> We were given the list of judgment possibilities by Judge Pierce (phonetic). And based on that, we made our determination of, how should this be judged? And what can we, in our minds and in our spirits, reconcile? And it was through the biblical principles, then, that we utilized that to say, yes, this is the only way – the only we that we can bring down the judgment and our recommendation . . . .

307a-308a.[3]

Notwithstanding the inconsistency between the state court's refusal to allow evidence concerning "the effect [the Bible] had upon any juror," the jurors' testimony and interview specifically acknowledging their use of the Bible, and the Fifth Circuit's own conclusion that "the jury's use of the Bible here amounts to a type of 'private communication, contact, or tampering' that is outside the evidence and law," the Fifth Circuit accepted the state court's determination that there was no "outside influence of any kind." 23a (quoting *Remmer v. United States*, 347 U.S. 227, 229 (1954)); 130a.

The Fifth Circuit never acknowledged the state court's preclusion of all evidence concerning the Bible's effect on the jury but nonetheless deferred to

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[3] The same juror stated that "when the civil law comes into direct conflict with biblical law, the biblical law will be the one that prevails" and that he does not "agree with separation of church and state." 304a; 314a.

its "findings." Stating that "[i]n essence, the state court made a finding that the Bible did not prejudice the jury's decision," the court presumed that those findings were correct. 27a. The Fifth Circuit's opinion provided no indication that it was cognizant of or considered the state court's refusal to consider evidence concerning "the effect [the Bible] had upon any juror. . . ." 130a.

Once it deferred to the state court's finding, the Fifth Circuit interpreted 28 U.S.C.§ 2254(e)(1) to require that Petitioner present "clear and convincing" evidence that the state court was incorrect. 27a. The Fifth Circuit concluded that Petitioner did not meet this burden. 27a-30a.

SUMMARY OF THE ARGUMENT

Petitioner's case raises fundamental questions about constitutional protections afforded to convicted persons facing a death sentence. Petitioner's First and Sixth Amendment rights were violated in this case when the capital jury charged with making decisions that would determine whether or not he received the death penalty consulted and relied upon a Bible during sentencing deliberations.

Federal circuit courts are split over what standard of review is appropriate when a jury violates a defendant's Sixth Amendment rights by consulting the Bible. The Fifth Circuit here erroneously deferred to the trial court's purported factual finding in denying the habeas petition. The court applied the wrong standard, however, because a capital jury's consultation with a religious text during deliberations is a structural defect in the trial. It was an external influence that pervaded the decision-making process and must be evaluated as presumptively prejudicial.

Even if this constitutional error was a trial type error, courts should be instructed to apply the "substantial and injurious effect" standard. The Court should grant the Petition for Writ of Certiorari in order to resolve the circuit split over which standard is appropriate for evaluating this type of constitutional errors on collateral review.

The capital jury's reliance on the Bible in this case also violated the First Amendment's Establishment Clause. A capital jury, charged with making decisions that lead to the most serious and irrevocable state action – the imposition of death – is a state actor for purposes of determining whether the Establishment Clause has been violated. In Petitioner's case, the capital jury's reliance on the Bible during sentencing served no secular purpose, had the primary effect of advancing religion, and fostered an excessive government entanglement with religion by essentially giving a biblical mandate the force of law which lead to Petitioner's death sentence. The Court should grant the Petition for Writ of Certiorari here in order to decide whether a capital jury's reliance on a religious text when recommending a death sentence violates the First Amendment's Establishment Clause.

ARGUMENT

I. This Case Presents An Important Constitutional Question About Which Federal Courts of Appeals Are Divided: Whether Consultation of a Bible by a Capital Sentencing Jury is a Structural Defect in the Trial Mechanism that is Presumptively Prejudicial on Habeas Review.

The Fifth Circuit held in this case that the jury's consultation of the Bible violated the Sixth Amendment, in accordance with this Court's precedents prohibiting external influences on a criminal jury. 21a. *Oliver v. Quarterman*, 541 F.3d 329, 334-40 (5th Cir. 2008) (citing *Parker v. Gladden*, 385 U.S. 363, 364-65 (1966); *Turner v. Louisiana*, 379 U.S. 466, 472 (1965); *Remmer v. United States*, 347 U.S. 227, 229 (1954); *Mattox v. United States*, 146 U.S. 140, 149 (1892)). The court noted that "here, several jurors collectively consulted a Bible, in the jury room, and likely compared the facts of this case to the passage that teaches that capital punishment is appropriate for a person who strikes another over the head with an object and causes the person's death." 23a. *Oliver*, 541 F.3d at 340. Going further, the Fifth Circuit held that the "jury's use of the Bible here amounts to the type of 'private communication, contact, or tampering' that is outside the evidence and law, which is exactly what *Remmer* sought to circumscribe." *Id.* (citations omitted). However the court then deferred to the state court's finding that the biblical consultation did not effect the jury's decision and concluded that this Sixth Amendment error was not reversible. 27a. *Oliver*, 541 F.3d at 342.

Rather than assessing the prejudicial impact of the constitutional error below, the Fifth Circuit interpreted 28 U.S.C. § 2254(e)(1) to require deference to factual findings made by the state court unless Petitioner presented clear and convincing evidence to "rebut the presumption of correctness that we must afford to the state court's factual finding." 27a-30a. Indeed, the Fifth Circuit concluded that it was bound by the state court's factual finding regarding the non-effect of the Bible on the jury and this conclusion led it to determine that the constitutional error was not reversible error under 28 U.S.C. § 2254(e)(1). 27a. *Oliver*, 541 F.3d at 342. That conclusion is inconsistent with this Court's directive that "in § 2254 proceedings a court *must* assess the prejudicial impact of constitutional error in a state-court criminal trial under the 'substantial and injurious effect' standard set forth in *Brecht*." *Fry v. Plileri*, 551 U.S. 112, 127 S.Ct. 2321, 2328 (2007) (emphasis added).

When reviewing constitutional issues raised in a habeas petition, courts must apply the standard set forth in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). Federal circuit courts are split in their opinion of how *Brecht* applies in cases involving improper influence on a capital jury resulting from consultation of the Bible during deliberations. *Compare Fields v. Brown*, 503 F.3d 755 (9th Cir. 2007), *cert. denied, Fields v. Ayers*, 128 S.Ct. 1875 (2008), *with McNair v. Campbell*, 416 F.3d 1291 (11th Cir. 2005). This case squarely presents an opportunity for the Court to establish the appropriate standard of review in habeas cases where a capital jury improperly consults a Bible or other religious text during sentencing deliberations.

A. The Jury's Consultation of the Bible During Capital Sentencing Deliberations Was a Structural Defect and Should Have Been Reviewed as Presumptively Prejudicial.

As the Court established in *Brecht* and reaffirmed in *Fry v. Pliler*, 551 U.S. 112, 127 S.Ct. 2321 (2007), the appropriate standard of review in considering most habeas petitions is whether than error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623 (citing *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). *See Fry*, 127 S.Ct. at 2327. This standard, however, is appropriate when reviewing "trial errors" that occur "'during the presentation of the case to the jury,' [that] 'may . . . be quantitatively assessed in the context of other evidence presented in order to determine [the effect the error had on the trial].'" *Brecht*, 507 U.S. at 629 (quoting *Arizona v. Fulimante*, 499 U.S. 279, 307-08 (1991)). However, as the Court has recognized, some constitutional errors are "structural defects," or more serious errors which occur "in the constitution of the trial mechanism, which defy analysis by 'harmless-error' standards," and are thus presumptively prejudicial. *Brecht*, 507 U.S. at 629 (citing *Fulimante*, 499 U.S. at 309).

The Fifth Circuit correctly concluded that the jury's use of the Bible was an impermissible external influence that violated the Sixth Amendment. 23a. *Oliver*, 541 F.3d at 340. The appropriate standard of review for this type of collateral challenge is the presumptively prejudicial standard recognized by *Brecht*. The type of error involved in this case – a Sixth Amendment violation based on a jury's impro-

per reliance on an external influence, here a religious text, during capital sentencing deliberations – should be evaluated under the heightened presumptively prejudicial standard.

The Court recognized in *Remmer* that an impermissible external influence on criminal jury deliberations relating to "the matter pending before the jury is, for obvious reasons, deemed *presumptively prejudicial*." 347 U.S. 227, 229 (1954) (emphasis added). The jury's consultation of the Bible when deliberating about the death penalty is presumptively prejudicial because it was an unconstitutional external influence that "infect[ed] the entire trial process." *Brecht*, 507 U.S. at 629-30. The error here did not occur during the presentation of the case to the jury and therefore cannot be quantitatively assessed in the context of the other evidence at trial, as "trial errors" sometimes can. *See Brecht*, 507 U.S. at 629. It is nearly "impossible to analyze in terms of harmless error" the effect of jury's consultation with the Bible during deliberations.[4] *See, e.g., Fulimante*, 499 U.S. at 291 (discussing the need for the presumptively prejudicial standard for structural errors).

Further, the evidentiary rules at issue restricted the trial court's ability to probe the prejudicial effect of the improper external influence on the jury. *See*

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[4] As discussed, *supra*, there is sufficient evidence in this case to find that the jury did in fact rely on the Bible during sentencing deliberations, but that is not usually the case. Nonetheless, this does not detract from the seriousness of the error and the need for a presumptively prejudicial standard in these types of cases.

Fed. R. Evid. 606(b), Tex. R. Evid. 606(b).[5] The recognized need to protect the privacy of a jury's decision-making however should not be elevated over a criminal defendant's Sixth Amendment rights. The conflicting demands of Texas Rule of Evidence 606(b) and the Court's directive in *Fry* that reviewing courts "must assess the prejudicial impact of constitutional error" has resulted in an untenable situation. The jury was improperly influenced by a Bible in reaching a determination that led to a death sentence and the improper influence was recognized as constitutional error, but the reviewing court decided that it could do nothing in light of the trial court's findings, which did not explore the effect of the unconstitutional influence due to the evidentiary rule. Application of the presumptively prejudicial standard is necessary to address this inherent conflict while allowing for review of structural defects in a way that protects both of these important interests of the criminal justice system – the jury's right not to have anyone questioning their deliberations and a defendant's right to be tried by a jury free of improper external influence. This standard would only apply once a

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[5] TEX. R. EVID. 606(b), states:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the jury's deliberations, or on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes. However, a juror may testify: (1) whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve.

constitutional violation has been established, so its scope would necessarily be limited.

Put into context, a jury's unconstitutional consultation of a religious text during sentencing deliberations in a capital case is a structural defect that is akin to having the the case tried before a biased judge, which the Court has long recognized as being subject to a presumptively prejudicial analysis. *See Fulimante*, 499 U.S. at 290, 294 (citing *Turney v. Ohio*, 273 U.S. 510, 535 (1927)). The stage of the proceeding is particularly important here as guilt had already been determined beyond a reasonable doubt. The only remaining issue for the jury in deliberations was whether or not Petitioner's conduct satisfied the criteria for the death penalty. To make that determination, the jury consulted the biblical passages concerning the propriety of imposing capital punishment on someone who commits murder with a metal object, just as Petitioner had done. Post-conviction testimony and recorded statements of jurors, combined with the questions that the jury was charged with answering, support the firm conclusion that the jurors consulted the Bible to determine whether Petitioner deserved to be sentenced to death. The passages cited provide a holy justification for imposing the death penalty in certain circumstances. Indeed, the most plausible explanation as to why jurors consulted passages about the propriety of putting those who commit murder with metal weapons to death is that the jury was trying to determine, as instructed by the trial court, whether there were mitigating factors that would warrant life in prison rather than the death penalty. 347a-348a. There can be little doubt that the biblical passages improperly influenced the jury's decision that such mitigating circumstances did not exist. For example,

one juror described the consultation of biblical passages as answering the question, "Is this the way the Lord would decide this case?" 328a. Moreover, the cited passages from the Book of Numbers state plainly that a murderer who kills with a weapon of iron or wood deserves the death penalty. Thus, it is readily apparent that the jury was consulting the Bible to determine the propriety of ending Mr. Oliver's life – an outcome the jury knew would ensue if they answered the judge's questions a certain way. 347a-348a

Similar to this capital jury's reliance on biblical text, a judge's bias would infect the fundamental fairness of the entire proceedings. Both types of error "str[ike] at fundamental values of our society and 'undermine[] the structural integrity of the criminal tribunal itself, and [are] not amenable to harmless-error review.'" *Fulimante*, 499 U.S. at 294 (citing *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986)).

The Eleventh Circuit has held that a juror's contact with extrinsic evidence during the course of a trial gives rise to a presumption of prejudice. *McNair v. Campbell*, 416 F.3d 1291, 1307 (11th Cir. 2005). The Eleventh Circuit reasoned: "Under federal law, any evidence that does not 'come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel' is presumptively prejudicial." *Id.* at 1307. The court went on to note that once a defendant shows that there was an impermissible external influence on the jury, "the State bears the burden of rebutting the presumption by showing that the jurors' consideration of the extrinsic evidence was harmless to the defendant." *Id.*

The Eleventh Circuit applied the appropriate standard in reviewing this type of error. A capital jury's consultation of the Bible during sentencing deliberations undermines the fundamental fairness of a criminal proceeding, is presumptively prejudicial, and not amenable to the "substantial and injurious effect or influence" standard in light of the conflicting demands of evidentiary rules that protect the privacy of jury deliberations. *See Brecht*, 507 U.S. at 623; *see also,* Fed. R. Evid. 606(b); Tex. R. Evid. 606(b). Only a presumptively prejudicial standard can adequately ensure the constitutional protection afforded by the Sixth Amendment in these circumstances.

B. Even If The Jury's Consultation of the Bible in This Case Was Not A Structural Defect, It was a Trial Error that Must Be Evaluated for "Substantial and Injurious Effect."

If the Court concludes that the jury's consultation of the Bible was a trial error and not a structural defect, it should still have been evaluated pursuant to the "substantial and injurious effect or influence" standard rather than the Fifth Circuit's erroneous requirement that the Petitioner present clear and convincing evidence to rebut a presumption of correctness of the state court's findings. *See Fry*, 127 S. Ct. at 2325, 2328; *Brecht*, 507 U.S. at 623; *Kotteakos*, 328 U.S. at 776. This standard requires that a court grant a habeas petition where a petitioner shows that the constitutional error "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 623. The Ninth Circuit, on the other side of the federal circuit split, applied the "substantial and injurious effect or influence" *Brecht* standard where

the jury used biblical quotations in the penalty phase of a capital trial. *Fields*, 503 F.3d at 776, 781.

If the Court determines that "substantial and injurious effect or influence" review is appropriate under the circumstances of this case, the Fifth Circuit's opinion must be reversed because it relied on 28 U.S.C. § 2254 and applied the wrong standard. The Fifth Circuit denied Petitioner's habeas petition because "the state court made a factual finding regarding the effect of the Bible on the jury" and the court held that it "must defer to that factual finding unless Oliver presented 'clear and convincing' evidence to the contrary." 27a; *Oliver*, 541 F.3d at 342 (citing 28 U.S.C. § 2254(e)(1)).

While 28 U.S.C. § 2254 instructs courts to defer to the factual findings of a trial court, it also states that a court may grant a habeas petition where there was an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254 (d)(2). Here, there was no evidence to support the state court's factual finding that the jury's consultation of the Bible had no prejudicial effect on its sentencing deliberations because the trial court refused to consider the effect of the biblical consultation. 74a-76a; 130a-131a; 134a-135a; 166a-167a; 182a-183a. In accordance with Texas Rule of Evidence 606, the trial court specifically excluded any evidence about the effect that the Bible consultation had on the jurors. 129a-130b. As a result, the trial court's factual finding was unsupported in the record and an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254 (d)(2). The Fifth Circuit erred in relying upon

that purported factual determination to deny the habeas petition.

The Fifth Circuit should have applied the *Brecht* standard of review for structural defects, i.e., presumptively prejudicial. The court should have recognized that the type of error in this case was presumptively prejudicial and thus reversible. In the alternative, the court should have granted the habeas petition under the "substantial or injurious effect" *Brecht* standard dicated by *Fry*, as the record showed that the jury's reliance on the Bible during deliberations had a substantial and injurious effect on the jury's sentencing deliberations. At a minimum, the Fifth Circuit should have assessed the prejudicial impact on its own, rather than deferring to the state court, which concluded that there was no effect after not allowing the jury to answer questions about the effect of the Bible on its deliberations.

Federal circuits are split over which of these standards should be applied to review the effect of a jury's consultation of religious texts during deliberations, and the Court should take this opportunity to clarify which of these standards is proper under the circumstances.

II. THE JURY'S CONSULTATION OF THE BIBLE DURING CAPITAL SENTENCING DELIBERATIONS VIOLATED THE FIRST AMENDMENT'S ESTABLISHMENT CLAUSE.

The jury's conduct in this case violated the defendant's constitutional protection against state establishment of religion. The victim in this case died from either a gunshot wound or from being hit in the head with the stock of a rifle. 2a During sentencing

deliberations, the jury consulted the Bible with respect to the appropriate punishment for the specific acts involved here: murder with a metal weapon or a weapon of wood. The specific biblical verses consulted included:

> And if he smite him with an instrument of iron, so that he die, he is a murderer: the murderer shall surely be put to death.
>
> . . .
>
> Or if he smite him with an hand weapon of wood, wherewith he may die, and he die, he is a murderer: the murderer shall surely be put to death.

3a-4a (quoting Book of Numbers 35:16 (King James)); *see also* 154a-155a). A juror also admitted that the jury "used the scripture to lend support for or against particular views." 331a. Thus, the jury in this case relied upon an improper external influence when deciding whether or not to recommend the death penalty, and that reliance is tantamount to an unconstitutional establishment of religion.

A. A Jury Is A State Actor and Must Be Subject To The Lemon Test On Whether They Violated the Petitioner's Establishment Clause Rights.

The First Amendment directs that "Congress shall make no law respecting an establishment of religion . . . ." U.S. Const. amend. I. The Establishment Clause is not limited to Congress, with its application extending to state actors. Courts have recognized a wide range of state actors, including an athletic association, school officials, and even doctors treating prison inmates. *Tenn. Secondary School Athletic Ass'n v. Brentwood Acad.*, 127 S. Ct. 2489, 2493

(2007); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995); *West v. Atkins*, 487 U.S. 42, 55 (1988). In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991), Justice Kennedy stated that a judge is "beyond all question" a state actor.

Likewise, a jury is also a state actor.[6] "The government summons jurors, constrains their freedom of movement, and subjects them to public scrutiny and examination." *Id.* Jury service is compulsory and juries take direction only from the judge; they are compensated by the state. Moreover, the right to a jury in a criminal trial is a constitutional right, granted to all criminal defendants subject to a felony conviction by the government. U.S. Const. amend VI. Further, a capital sentencing jury administers the most serious sanction that the state can impose on one of its citizens – death.

It is no great leap of faith, therefore, to treat a capital sentencing jury as a state actor. The jury assumes the power of the state and jurors receive privileges and immunities reserved for governmental actors. *See* Terrence T. Egland, *Prejudiced by the Presence of God: Keeping Religious Material Out of Death Penalty Deliberations*, 16 Cap. Def. J. 337, at 359-60 (2004). *See also Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 626 (1991) (calling a jury a "governmental body").

The Court, in *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971), determined that the Establishment Clause "was intended to afford protection [against]: 'sponsorship, financial support, and active involve-

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[6] The trial judge in this case even stated that he was the "sole juror," recognizing that he was serving in the jury's capacity when making a post-trial decision as to Petitioner's fate. 149a.

ment of the sovereign in religion activity.'" *Id.* (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)). The *Lemon* test, while traditionally used to determine legislative legality, can serve as a useful barometer in examining constitutionality of other state actions.[7] In this case, the capital sentencing jury represents the sovereign, charged with determining the life or death of the accused.

In order to abide by the Establishment Clause a jury's actions need a secular purpose; the "principal or primary effect [of the action] must be one that neither advances nor inhibits religion;" and a jury's actions "must not foster 'an excessive government entanglement with religion.'" *Lemon*, 403 U.S. at 612-13 (citations omitted). *See* Gary J. Simson and Stephen P. Garvey, *Knockin' On Heaven's Door: Rethinking the Role of Religion in Death Penalty Cases*, 86 Cornell L. Rev. 1090, 1120-29 (2001). Here, however, the jury that recommended the death penalty violated the Establishment Clause when it utilized a Bible to determine the propriety of the death penalty for a specific crime.

B. The Jury's Bible Consultation Violated the Establishment Clause.

A jury's consultation of the Bible during capital sentencing determinations serves no secular purpose. As in this case, juries in other death penalty cases have relied improperly upon the Bible to determine whether a death sentence is appropriate. *See, e.g.*,

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[7] Although several Justices have criticized the *Lemon* test, amici offer its use an approximation for determining a violation of the Establishment Clause. *See, e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398-99 (1993) (Scalia J. dissenting).

Jones v. Kemp, 706 F. Supp. 1534 (N.D. Ga. 1989); *Colorado v. Harlan*, 109 P.3d 616 (Colo. 2005); Egland, *supra*, at 361. While courts have postulated whether or not the use of the Bible constitutes harmless error, none of the cases have ever stated that the Bible served a secular purpose. Courts have called the Bible "an authoritative religious document," far from an endorsement of a secular purpose. *Jones*, 706 F. Supp. at 1559. The Fifth Circuit held that the jury's use of Bible verses "during the sentencing phase of the trial amounted to an external influence." 21a. *Oliver*, 541 F.3d at 340. The Fifth Circuit referenced the First, Sixth, and Ninth Circuits, noting that both the First and the Sixth Circuits considered the Bible to be an improper external influence when present in the jury room, while the Ninth Circuit never reached the question. 16a-18a. *Id.* at 337-38.

A jury's reliance on the Bible when deliberating the possible imposition of the death penalty is an unconstitutional establishment of a religious creed by the State, in the form of a jury as a state actor. Reliance on the edicts of the Bible, or any other religious text, improperly uses religion to assist with a death penalty determination. One juror explicitly stated, "the biblical law will be the one that prevails. And that's the way I judge . . . ." 304a. He even asked himself "is this the way the Lord would decide the case?" 327a. This reliance on the teachings of the Bible, an improper external influence, unconstitutionally established religion in the jury room of the petitioner.

A jury's consultation of the Bible during sentencing deliberations also comprises government entanglement with religion by promotion of "a fusion of

governmental and religious functions that violates the Establishment Clause." Egland, *supra*, at 361. In the sentencing phase of the petitioner's case, the jurors admitted to having at least one Bible in the jury room, and expanded their sentencing deliberation to include specific verses of the Bible. As one juror stated, "I was reading out of [another juror's] Bible. After I read it, I think one more person read out of her [Bible]. . . . And this is what I recall, [another juror] being back there and reading out of a Bible, and then seeing us read out of a Bible and wanting to know what we were reading." 151a. Another juror stated that "most of us there, about 80 percent, brought scripture in the deliberation. . . ." 327a. This "fusion" of the courtroom evidence and religious text produces the very entanglement of government and religion that the Establishment Clause intended to prevent.

The First Amendment's Establishment Clause issue presented by this case does not turn on consultation of the Bible. Whether the religious text used by a capital sentencing jury was the Qur'an, which might support imposition of the death penalty, *see Fields*, 503 F.3d at 785 (Gould, J., dissenting in part and concurring in part), a Mennonite guide or Catholic Catechisms, both of which oppose the death penalty, the issue is whether a jury's resort to an improper external influence that happens to consist of religious teachings on the issue at hand comprises an unconstitutional establishment of religion in violation of the First Amendment. Amici submits that it does.

CONCLUSION

For the foregoing reasons, amici curiae respectfully request that the Court grant Mr. Oliver's Petition for a Writ of Certiorari.

Respectfully submitted,

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